

**THE USE OF TORT LAW  
IN THE PROTECTION OF HUMAN RIGHTS:  
AN ALTERNATIVE TO HUMAN RIGHTS BOARDS?**

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## ABSTRACT :

It is an integral part of rights protection that "adequate" remedies exist. This thesis examines the present functioning of human rights legislations in Canada and articulates fundamental problems with the current Canadian regimes in the enforcement of rights against private actors. The possibility of using tort action as an alternative in the protection of human rights in Canada is then discussed, with particular attention given to the potential for increased damage awards and for wider grounds of prohibition of discriminatory practices.

The thesis revisits the Supreme Court of Canada decision in Bhadauria v. Seneca College and analyzes the basis on which human rights legislation was seen as a creating barrier to a collateral tort action. In contrast with the decision in Bhadauria, the thesis concludes that the present state of tort law is capable of handling this new category of compensable damage. It is further suggested that the realities of human rights protection require reconsideration of alternatives to the present schemes in order to give effect to "adequate" remedies.

Drawing on the philosophy of A.J.M. Milne, the thesis addresses the role of judiciary as actively protecting the rights rather than simply enforcing what already exists.

Referring specifically to a nominate tort of discrimination, the thesis provides a framework for the consideration of such a tort, relying on a standard of care equivalent to "negligence" in which the private actor has failed to live up to a universal or "community" standard of reasonable behaviour.

In part, because any group can narrowly focus and prioritize issues and concerns that are of primary importance to them as a group, this "community" can not be a localized body. A well functioning "community", instead, is characterized as utilizing and applying universal standards and principles such the principle to fair treatment. This principle entails that there be a "sufficient connection" between the ground of distinction and and the treatment involved. These become the standard by which the private actor is to be judged.

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## Chapter 1: Introduction

History of the twentieth century has seen a growing recognition of the existence of certain minimum standards of treatment by which all nations must abide.<sup>1</sup> Nations can no longer can legitimately profess to have absolute power over the people within their borders.<sup>2</sup> Whether this results from a priori reasoning<sup>3</sup> or from a consequentialist analysis,<sup>4</sup> it has been acknowledged that there exist rights, attributable and claimable solely by virtue of being human. Commonly labelled as "human rights", these are tied to the essential nature of the person, with concepts of dignity, mutual respect and equality, inter alia, frequently ascribed. Argument still ensues over the exact character, nature and scope of the rights, and considerable debates centres on the methods for achieving the rights' protection.<sup>5</sup> However, in contrast to what might be characterized as controversies of perimeters, within the international forum the existence of these kinds of rights is seen generally as being beyond question.<sup>6</sup>

### I. Protection from the State

Coinciding with the trend to recognition of the existence of human rights (and indeed a fundamental part of it), there has been a growing international emphasis on instituting effective means for the maintenance and enforcement of the rights. To

that end, international treaties and covenants have been created, establishing standards of conduct.

Through regional and international documents, nations have increasingly obligated themselves as states, to treat people within their borders according to the agreed measures. The placement of limits on the state, typically by constitutional measures, has been a commonplace response to the treaty responsibilities. This kind of restriction comes from a recognition that the state has the potential for significant harm, not only wielding substantial power, but also having the authority to buttress its actions.

Considerable emphasis is placed on what is seen by some to be the unique position of the state. No matter whether ethically right or wrong, a state's actions have a sense of legitimacy attached to them. As is often pointed out, where there have been violations of rights the victim typically turns to the state to redress the situation. The state acts as protector; but if the state is the violator, the question arises "From where can the protection come?" For that reason, limits on state action are seen as crucial.

## II. Protection in the Private Sector

Nevertheless, it is erroneous to assume that acknowledgement of the need for restriction of state action has been the only direction in human rights efforts at the international level. Concomitantly, there has been recognition that the state is not the only actor to be feared.<sup>7</sup> Some countries have

recognized this possibility for harm and have explicitly made their constitutions applicable as a limitation on both the public and the private actor.<sup>8</sup> In this view it would be inconsistent to call these "fundamental freedoms" or to deem these "intrinsic" and yet to enforce them only against the State.<sup>9</sup>

Over the years the direction in rights protection has shifted toward holding both public and private actors responsible for human rights infringements. The excesses of the second World War may have provided particularly clear indication that both public and private actors must be answerable for violations to dignity and equality. At the Nuremburg Trials the accounts of war crimes, crimes against humanity and torture brought to the fore that these acts were not only human rights violations committed by governments; they were at the same times violations committed by individuals,<sup>10</sup> for which individuals were to be held accountable.<sup>11</sup> The transgressions were regarded not only as the end result of wholesale abrogation of the rights of individuals, but also as breaches witnessed by the community and to some extent acquiesced by it.

Further in support of dual responsibility for human rights (that is, public and private), it has also been noted that the domestic implementation of human rights agreements ultimately depends upon all individuals. "As rights granted to the individual, it is upon the beneficiary of these rights, the individual human being, that the responsibility for preservation falls".<sup>12</sup> If society or its constituents become indifferent to the

plight of others, not only are the rights of these victims eroded, but the foundation of the community is placed in jeopardy.

At the same time, and with a view to consequences of non-protection, it has become recognized more and more that the state is not the only party capable of holding significant power and control over the lives of people. The state controls the law,<sup>13</sup> but others may dominate just as effectively through the use of economic and social power.<sup>14</sup> It has been pointed out that

...in our day, the most grievous and most frequent abuses of civil liberties occur in the exercise of private power. The occasions of discriminatory state action are few and subject to relatively formalized procedures for their exercise, when contrasted with an employer's power to dismiss, a landlord's power to exclude the needy, or an entrepreneur's refusal to provide service, capacity to infringe substantive rights. Not only do the titularies of private power have the capacity to infringe substantive human rights, but no concept of due process structures the manner in which they avail themselves of this capacity. <sup>15</sup>

In recognition of these ancillary harms, nations have at the same time obligated themselves to ensuring that people are treated according to the same minimum international standards by actors other than the state. Consequently, states have become more aware that the responsibility for assuring rights lies not only with all levels and branches of the government, but with all people.

In particular, the International Covenant of Civil and Political Rights ("the International Covenant"),<sup>16</sup> to which Canada has been a signatory since 1976, in Article 2 (1) states that

each state will not only undertake to respect the rights of all individuals, but also will ensure to the individual all the rights recognized in the Convention.

Article 2 (3) of the International Covenant elaborates on that commitment:

Each State Party to the present Covenant undertakes:

a) To ensure that any person whose rights or freedoms are violated as herein recognized shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in official capacity. (emphasis added )

It is evident that this notwithstanding clause would be superfluous if the protection was only from government in the first place.<sup>17</sup>

It is not only logical consistency that dictates there should be substantial mirroring between the public and private sectors where human rights are at stake.<sup>18</sup> Even assuming that the state could not undermine its own responsibilities through a form of wilful blindness,<sup>19</sup> it certainly would be less than sensical that a government would be prohibited from certain actions only to allow private members to engage in the same reprehensible behaviours. This is because it is the behaviours (and more importantly, the consequences of them) that are reprehensible, not the title of the actor.

In recognition of this, Article 2 (3) of the International Covenant sets out that the responsibility of the state in detail. Firstly, the state is "to take the necessary steps...to adopt such

legislative or other measures as may be necessary to give effect to the rights recognized in the (present) Covenant."<sup>20</sup> To that end, the duty is also

(b) [t]o ensure that any person claiming such remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities or by any other competent authority provided by the legal system of the State and to develop the possibilities of judicial remedy;

and

(c)[t]o ensure the competent authorities shall enforce such remedies when granted.

The consequences of these commitments are twofold. It means, first, that there is a responsibility on the private actor not to violate the rights of others and, second, that there is a responsibility on the the state to ensure and enforce the rights of others.<sup>21</sup> In this respect there must be not only protection from the State, but also there must be opportunity for the individual to achieve freedom and dignity through the State. Inherent in that must be legal safeguards to assure the right.<sup>22</sup> The international rights instruments also recognize the responsibility of government to protect people in both public and private spheres of activity.

### III. A Theoretical Approach: A Movement away from Classical Liberalism

While states have recognized the necessity for the protection of rights, some have also shown reticence to limit or

correct behaviour of private actors.<sup>23</sup> This, in part, may be due to reasons of legitimacy and of resources. Although the state is seen as carrying the power and the authority to require certain behaviours of its people, the task of checking the individual may be a far more difficult task than getting the state to change its behaviours.

By way of explanation, firstly the state has a degree of control over its own agents that it may not have over the private sector. In part, this derives from the fact that we shape our government-- theoretically, we select its form, we control its actions and it is accountable to us-- all as part of our concept of limited government. Consequently, limits on state action are inherent .

In terms of practicality and resources, the state organ is but a small percentage of the general population. The state can alter the behaviour of its branches through the issuance of directives and regulations. The state has a certain degree of control over the day-to-day operation of its personnel, rewarding through promotion or sanctioning through demotions or job termination.<sup>24</sup> At the same time, government is subject to more direct feedback because it is in the public eye.

These same devices are not usually available for use against the larger population. Unlike departments of government, the private sector is divided into considerably smaller units-- either the individual or the business for whom the regulatory machinery cannot be there all the time. Limited resources of legislative time for the creation of laws and



perhaps more significantly limited resources to enforce them, make these reasons of pragmatics.

In many respects it has been seen not only as more difficult, but also as less appropriate, to change private conduct than it is for public behaviour. Perhaps because in the western world many of us tended to operate under a conception of society in which laws are only to be "little islands of constraint on a sea of liberty", <sup>25</sup> liberty stood as the norm and constraint as the exception.<sup>26</sup>

This type of classical liberal theory, however, has been seriously questioned of late, in part because it values liberty over all other competing rights, particularly equality. By way of comparison, the international documents to which Canada has ascribed acknowledge that liberty, although important, carries with it inherent limits, limits that result from the equal rights of others. Again, this may result from looking to the severe consequences of inequality. Placed within a theoretical context, the international movement to rights protection can be characterized primarily as either a natural law or a rights based perspective.

Chapter 2 of this thesis presents a philosophical framework which establishes an understanding of the foundation of human rights and which sets the duties of actors, whether the state or the private person. Presented by A.J.M. Milne,<sup>27</sup> the approach elaborates on Immanuel Kant's "humanity principle" and perceives the person as developing rationality and consciousness of self only from within the concept of "community". Whether the

community is the family, the tribe, the nation or the world, certain obligations must exist among the people to ensure community's continued existence. It is Milne's position that these obligations, labelled our "common morality", in turn create the moral foundation for the establishment of specific human rights and demand effective protection of the rights.

Because it presents a view of human interaction that functions on all levels of human discourse, Milne's analysis is particularly interesting for the purposes of this thesis. In many senses this is a natural rights perspective, not in that it presupposes a "higher law" from God, but that it identifies a higher law from within the human (social) nature.

This view defines the role of government as that of agent for the community. Government's only legitimate authority is to act for the well-being of the community, a responsibility which is not to be confused with the well-being of special interest groups or even the majority of the community in the short term. State or government actions are always to be measured by and compared with the "common morality".

In Milne's assessment, as with government, the judiciary must also apply principles of common morality in their adjudications. Using these principles both as interpretive devices and as standards against which legislation should be measured, it is a responsibility the judiciary must fulfil whether they are dealing with the public sector or the private one.

The approach also establishes criteria as to what constitutes an "effective remedy", removing it from the realm of

personal values alone. By this, at a minimum what is meant is 1) a remedy adequate to combat the incursion 2) considered impartially by an independent body 3) in a manner that leaves a close enough connection between the violation and the remedy of it, as to reinforce the negative consequences to the violator.

In Chapter 2 it is argued that the first of these elements, adequacy, must be concerned not only with compensatory justice (which is essentially re-active), but also with preventive justice (which is pro-active). Adequacy must also be connected with ease and availability of the remedy to the victim. The second and third requirements listed above are self-evident, with both appealing to our popular sense of "justice".

#### IV. Canada's Efforts to Human Right Protection

Canada, having obligated itself to the requirements of international covenant and customary international laws, is now required to meet those obligations, irrespective of whether the violator is the public or the private actor. This thesis examines the specific manner in which Canada has approached its international responsibilities, the areas in which Canada has fallen short, and the ways Canada might more strongly enforce the human rights which it has ostensibly committed itself to protecting. In particular, the thesis observes role of tort law could serve in the protection of rights.

Overall, Canada has striven to meet some of its international obligations through a patchwork of measures, each touching upon a particular area of human rights but none with

sufficient breadth to handle the entire task. In many instances Canada seeks to ensure a right only by refraining from acting—by not intruding on liberties or by not making laws, basically from allowing liberty and freedom to progress unimpeded. Where historically there have been instances of a right being restrained or repressed, e.g. a freedom of religion, the absence of restraint becomes construed as a positive freedom.

Yet most rights cannot be secured in this manner. Instead the rights require active effort on the part of government. In the positive protection of rights Canada has utilized several alternatives, including criminal law and other legislative measures. At the apex of these is the Canadian Charter of Rights and Freedoms (hereafter referred to as the Charter)<sup>28</sup> functioning as a cap on the overzealousness of government in its dealings with its citizenry or others within its borders. The Charter is situated as a standard against which any legislative or regulatory action the government takes is measured.

Although the Canadian judiciary has hinted that the common law is to be dovetailed to fit with the Charter,<sup>29</sup> the Charter, itself, does not seem to limit, to any noticeable extent, the efforts of private citizens in relationship to each other. Even if examined on the basis of its operation within the public law field,<sup>30</sup> the Charter falls well short of meeting its international commitments and Canada has been castigated for this.<sup>31</sup> While other forms of Canadian legislation exist in the human rights area, these operate in a piecemeal manner to

handle perceived deficiencies or only touch upon human rights matters tangentially.

#### V. Human Rights Acts as Protection

Chapter 3 describes how the major impetus for protection in Canada has been left to human rights legislation operating at either the the federal or the provincial level.<sup>32</sup> Basically, the legislation attempts to provide an inexpensive method of resolving complaints, generally in the area of discrimination, and seeks, wherever possible, to generate "friendly settlement."

As Canada's commitments obligate the country to making sure there are effective remedies in place, human rights legislation has been ( and should be) an important step in the enforcement of rights.<sup>33</sup> However, Chapter 4 points out that there are difficulties in relying solely on this particular kind of human rights legislation as in any way meeting our international responsibilities.

Firstly, to attach the overarching term of "human rights" to such legislation may be erroneous. Instead, its main emphasis is on certain kinds of non-discrimination and, to some limited extent, on the provision of equality.<sup>34</sup> The legislation does not give a right to work, or a right to education or even a right to a family. Rather, it only strives for more equalized access to certain goods or services provided in the first place. Thus, that which is covered is but a small part of the whole spectrum of human rights.

In addition, the legislation deals only with certain categories of discrimination - typically race, religion, sex and, to a limited extent, age. By way of contrast, the Covenant prohibits discrimination on the basis of certain listed categories and, then additionally, commits States to prohibiting discrimination on the basis of "any other status".<sup>35</sup> The chapter explains the difference between the international obligation and the Canadian response to it. In the former, once a discrimination on the basis of a particular status is shown, the onus shifts to the defendant to show that it was not unreasonable or was justifiable.

In contrast, the view of Canadian human rights legislation has been that unless a category is listed, no violation can be found no matter how unreasonable the distinction.<sup>36</sup> This is only one of the many limitations and deficiencies of the present legislative approach in Canada.

Chapter 4 goes on to point out that the principal drawback to legislation of this kind is that it serves numerous goals, some which may be diametrically at odds with the others. The human rights legislation, as it now stands, strives for a balance, drawing certain dichotomies between public and private life, and in doing so reflects certain policy decisions rather than a necessarily principled approach to human rights.

It is argued in this paper that this legislation, standing alone, cannot hope to deal with all human rights matters. For example a major problem with reliance on human rights legislation is its potential for ebb and flow according to the caprices of the population and the temperament of the

government. Neither propensity accords well with a formulation of human rights as being intrinsic to the individual. At the same time these kinds of machinations severely affect the goal of providing an "effective remedy" which is Canada's international obligation to uphold.

Moreover, it is argued here if we are searching for "effective" remedies, what human rights legislation allows to be compensated (or more accurately to what extent it allows harms to be compensated) may be one of its greatest drawbacks.<sup>37</sup> Compensation under human rights legislation derives only from specific statutory heads of damages and under monetary "caps" that may inadequately meet the actual harms felt.<sup>38</sup>

## VI. A Role for Tort Law

Lacunae exist within the human rights legislations, and Chapters 5 and 6 examine the viability of tort law to fill the gaps. Because the recognition of human rights appears to be a twentieth century phenomenon, to some presenting tort law (typically seen as entrenched in the nineteenth century) in a human rights framework may seem foreign. In this paper it is argued that, at our present stage of development, torts are capable of handling some types of human rights issues. It is posited that tort law has already demonstrated some capacity in the area, by historically providing compensation for harm to the person's physical and psychological well-being.<sup>39</sup> In particular, psychological well-being has been extended over the years to

deal with less palpable injuries like indignity or emotional distress,<sup>40</sup> a movement that accords well with significant aspects of human rights losses. Chapter 5 marks that progression.

On a jurisprudential basis, tort law also accords with human rights goals. Tort law "recognizes the interactive responsibilities and rights of those who function in a community ...the essence of tort law is arguably the imposition of liability for failure to measure up to a community standard and a consequent shifting of losses incurred by that failure".<sup>41</sup> The aim of tort law has been perceived as functioning, inter alia, to correct and compensate for past harms in a measure that is roughly equivalent to the plaintiff's loss and as acting to deter violations and shape future conduct. Indeed, it has been noted that historically

the function of tort remedies was seen primarily as admonitory or deterrent. An award against a tortfeasor served as punishment and as a warning to others; it was in a sense, an adjunct to criminal law, designed to induce antisocial and inconsiderate persons to conform to the standards of reasonable conduct prescribed by law.<sup>42</sup>

Although tort law has subsequently gone beyond this role, these compensatory and admonitory functions would seem to be well suited to the protection of human rights. Indeed, tort law has been used in a variety of ways in the protection of human rights by other nations (and even by Canada), albeit not always explicitly recognized in that framework.



Admittedly, tort law principles may not be able to handle all the diverse goals inherent in human rights protection. Typically, torts are equated with the remedy of damages, and frequently we do not see monetary compensation as adequately resolving some types of human rights problems, such as systemic discrimination.<sup>43</sup> Indeed, on a gut level we may tend to see monetary compensation as a purchase of the right to violate. It is important, however, to distinguish between the inadequacies of monetary compensation sui generis and the inadequacies of tort law in the area of human rights.<sup>44</sup> Other remedies such as injunctions, declarations and specific performance are all available through the tort action as well.<sup>45</sup> It is only curial reserve in considering these other remedies that may place a rein on tort law's capacity.<sup>46</sup>

## VII. Bhadauria v. Seneca College

Nonetheless, this line of argument in favour of tort law protection may be seen by some as otiose, if human rights legislation has already "taken over the field", displacing any role for either judiciary or for tort law. The 1978 case of Bhadauria v. Seneca College<sup>47</sup> raised exactly that possibility when the court was asked to recognize a tort of discrimination based on either the public policy in Ontario's Human Rights Code<sup>48</sup> or a new tort duty based on the statute. While the Court of Appeal believed that there could be a tort of discrimination, the Supreme Court maintained that as Ontario's legislation was a "Code", complete

unto itself, the judiciary could not simultaneously recognize a new tort.

In Chapter 7 it is respectfully argued that in Bhadauria the court erred in excluding a civil remedy. The legislature did not explicitly set out that there should be an exclusion. At the same time, the authour feels that Bhadauria also needs to be understood in the context of the development of tort law at the time. Bhadauria would have raised several legal difficulties (which have since resolved), that the judiciary were not able to respond at the time.

In part, Bhadauria was decided on the basis that the legislation gave an effective remedy. The judges cannot be faulted for assuming that the trend towards protection would continue; however, research on the actual functioning of human rights boards belies that. It is argued that in light of developments within some provinces (such as British Columbia's wholesale removal of its human rights board),<sup>49</sup> the judiciary's presumption of the existence of an "effective remedy" may have been myopic and erroneous. The boards have been subject to short term ideological shifts that jeopardize the rights of the most vulnerable. This, therefore, runs counter to any idea that these are intrinsic rights. These tendencies, plus the substantial differences between the provisions of the legislations and Canada's international commitments, make the acknowledgement of human rights torts in Canada that much more pressing.

However, even if there is a theoretical capacity for torts to handle human rights claims and even if there is the need for

intervention, the question still remains whether the judiciary is the proper body for that intervention. As critics are wont to retort, "[t]hey have been conservative--even reactionary...".<sup>50</sup> So, administrative decision-making has generally been removed from the courts, generally on the arguments of expediency and expertise. It is suggested in this paper that neither justification, expediency nor expertise, need necessarily hold. While previously a good portion of the judiciary have not been fully apprised of human rights issues, experience gained through interpretation of the Charter, as one example, has gradually been changing that situation.

Also, even though the judiciary traditionally have been seen as indifferent to these kinds of claims,<sup>51</sup> their past decisions in this area attempted to retain a certain degree of logic and symmetry of the law.<sup>52</sup> They worked from principles.<sup>53</sup> It will be shown here that the same requirement now offers promise for a greater protection of human rights. Chapter 2 sets out an explanation of (and a rationale for) human rights based on the social nature of the individual. This theoretical framework generates principles functioning on all levels of human interaction and offers a specific role for the judiciary with interpretive principles to guide them.

### VIII. Tort Possibilities

Chapter 8 suggests where the judiciary might act by allowing human rights torts. While the possibility is greatest where a province's legislature totally rid itself of human rights legislation (in contrast to where provinces which substantially changed the trappings and the coverage), such a drastic measure would likely be political suicide. Therefore, it is unlikely to ever occur (at least to the degree suggested). However, other possibilities are explored: categories of discrimination that are prohibited in most provinces, but not in some; human rights legislations that are not "codes"; human rights outside discrimination (for example privacy); and human rights outside a specific province's legislation (areas where the legislation might have theoretically covered, but have not been interpreted as being so covered).<sup>54</sup>

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## CHAPTER 1 FOOTNOTES

1 H. Cleveland, "The Internationalization of Internal Affairs" in A. Henkin (ed.) , Human Dignity, (New York: Aspen Institute for Humanistic Studies, 1978), 43 ff.

2 This approach stands as marked contrast to that of the 18th and 19th centuries where the concept of "sovereignty" or ultimate power of the state flourished . See D.J. Harris, Cases and Materials on International Law, 3rd ed. (London: Sweet & Maxwell, 1983), 470 ff.

3 For an interesting analysis see A. Diemer, "The 1948 Declaration: an analysis of meanings" in Philosophical Foundations of Human Rights, (Paris: UNESCO, 1986), 97ff.

4 J. Donnelly, The Concept of Human Rights (New York: St. Martin's Press, 1985), 30 ff. Jack Donnelly could probably be labelled a consequentialist in that he sees human rights as a means to achieve human dignity but does not see rights coming out of human nature or God, or physical world though.

5 Even when Idi Amin, Pol Pot and Pinochet acted they either denied the facts or tried to justify them but they never sought to deny the validity of the Declarations per se. See P. Alston, " The Universal Declaration at 35: Western and Passe or Alive and Universal", (1983) 32 Int'l Comm. Jur. Rev. 60 at 62.

6 M. Mead notes a similiar idea in "Some anthropological considerations concerning natural law" in Lord Lloyd of Hampstead, ed., Introduction to Jurisprudence 4th ed.(London: Stevens & Sons, 1979) 156.

Also, J.Hersch , "Human Rights in Western Thought: Conflicting Dimensions" in Philosophical Foundations of Human Rights (Paris: UNESCO, 1986) at 132 ff. Ms. Hersch states that although there may not be a universal concept of "human rights", all people are aware of these rights.

7 In the 1950 Special Committee on Human Rights , Senate Proceedings, at 24 it is stated

Again one great difficulty in the protection of freedom is the provision of adequate remedies for acts violating them. It is almost easier to check the actions of legislatures than of individuals, though the power of direct reference of laws to the courts...(emphasis added).

See also R.A. MacDonald "Postscript and Prelude- the Jurisprudence of the Charter- 8 Theses" (1982 ) 4 Sup. Ct. Law Rev. 321 at 324 who notes the most grievous abuses of civil liberties in the 20th century as coming from the exercise of private power- through doctrines of private property, freedom of contract and fault based liability.

8 The Germany Constitution is one such example. As well, the Hungarian Civil Code Art. 85 makes allowance for a tortfeasor and the Swiss Civil Code ( 1907) has openings in private law. See Aspects of Privacy Law , Dale Gibson, ed. ( Toronto: Butterworth, 1980) at 82.

9 G. Maddott, "Libel Law, Fiction and the Charter" (1983) 21 Osgoode Hall L.J. 741 at 756-766.

10 See also the U.S. Diplomatic and Consular Staff in Tehran Case : (USA v. Iran) I.C.J. Rep.(1980), p.3.

11 D. Matas, "Domestic implementation of international human rights agreements", (1987) Cdn.H.R.YrBk. 90 at 114.

12 Ibid. at 117.

13 In Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics , 403 U.S. 388, 20 L.Ed. 2d 619, 91 S. Ct. (1971) ( reference will be to L. Ed.) Justice Brennan noted:

The mere invocation of federal power by a federal law enforcement official to resist an unlawful entry, or arrest by resort to the local police; and a claim of authority to enter is likely to unlock the door as well.

14 For a critical perspective on the Canadian Charter of Rights and Freedom as only protecting us from state power see : A.C. Hutchison & A.Petter, "Private Rights/ Public Wrongs: The Liberal Lie of the Charter" (1988) 38 U.T.L.J. 278, who at 283 emphasizes that the question more accurately is "On whose behalf state power should be exercised?"

15 R.A. Macdonald, supra n. 7 at 347 however notes that power is not law. The question becomes do we want every exercise of power reviewed by the state- nominated body- the judiciary?

There has been a similar type of discussion with regard to whether the Charter applies to private action. Some writers feel it cannot, because the Charter applies to "laws" and there can not be "laws" about everything, in the sense of legal consequences. Instead it is important for us to leave large and important extra-legal areas. (See the position of W.R. Lederman as discussed in the article by J.D. Whyte, "Is the Private Sector Affected by the Charter?" in L. Smith et al eds, Righting the Balance: Canada's New Equality Rights, (Canadian Human Rights Reporter, 1986), 145 at 166.

16 U.K.T.S. 6 (1977), Cmd. 6702; 61 A.J.I.L. 870 (1967).

17 Other provisions in international agreements also suggest that there is necessarily a private responsibility aspect to these rights. At Article 30 of the Universal Declaration of Human Rights (G.A.O.R. 217A, (III)) G.A.O.R., 3rd Sess., Part I, Resolutions, p.71) it is noted that nothing in the Declaration is to be interpreted as implying "for any State, group, or person " any right to engage in any activity aimed at the destruction of any rights and freedoms set in the Declaration.

This is a commitment reaffirmed in Article 5 of the International Covenant of Civil and Political Rights U.K.T.S.D.6 (1977), Cmd. 6702; 61 A.J.I.L. 870 (1967). ("ICCPR"). Additionally, at Article 29 (1) the Universal Declaration reminds us that "everyone has duties to the community in which alone the free and full development of his personality is possible." Among those duties, of course, is the obligation not to infringe on the rights of others.

18 G. Samuel, "Public' and 'Private' Law: Definition Without Distinction" (1980) 43 Mod. L. Rev. at 240 suggests that economic power could be seen as moving the questions into public law. He worries however that to fail to distinguish between private and public law will open the state to private defences such as "privacy".

19 See Janes Claim (U.S. v. Mexico) U.S. - Mexican Claims Commission (1926) 4 R.I.A.A. 82 or Quintanilla Claim (Mexico v. U.S.) U.S.- Mexican General Claims Commission (1926) 4 R.I.A.A. 101.

20 Supra, n.16, Article 2 (2) ICCPR.

21 E.g. in the Marckz case (Eur. Court H.R. , Series A, Vol. 31, Judgment of June 13, 1979) the court said that under Art. 8 of European Convention on Human Rights 1950, E.T.S. No. 5; U.K.T.S. 70 (1950), Cmd. 8689 there may be positive obligations inherent in an effective "respect" for private life.

In the Marckz case the "respect for family life" in particular implied the existence in domestic law of legal safeguards that rendering possible the child's integration in his family from the moment of birth.

See A.M. Connelly, "Problems of Interpretation of Art. 8 of ECHR " (1986) 35 Int'l Comp. Quar. 567 at 573.

See also T. Opsahl " The Convention and the Right to Respect for Family Life " in Privacy and Human Rights, ( 3d ed.) A.H. Robertson, ed.(Manchester: Manchester University Press, 1970) 182 at 188. Opsahl notes that the state may have an obligation under the Convention to recognize a and to some extent protect and enforce the legal ties between person. It could perhaps be said that the State itself violated the Convention if it left the individual helpless in face of grave breaches of family rights by another person.

22 Connelly, supra n. 21 at 575 .

23 Dolphin Delivery v. R.W.D.S.U. [1987] 3 W.W.R. 673 (S.C.C),  
Dickson, J.

24 E.g. Moore v. B.C. (Gov't) (1986) 4 B.C.L.R. (2d) 246 (where a social worker was dismissed for refusing on religious grounds to sign medical expenses slips for abortions).

25 J.D.Whyte, *supra* n. 15 at 172.

26 One reason for this is that liberty is seen as another aspect of the exercise of free will and rationality. In this view the more laws that exist, the more offended is our sense of liberty because it is no longer an exercise of free will by the individual. In this view, except where the societal benefit seems to strongly necessitate the need for laws, any government action to shape our behaviour will always be questioned as somehow "illegitimate". While this stance may be acceptable within a narrow and conservative western view of rights, it is not the one that functions on the international rights scene.

27 A.J.M.Milne, Human Rights and Human Diversity (Albany: State University of New York Press, 1986).

28 Canadian Charter of Rights and Freedoms, Constitution Act, 1982, as enacted by Canada Act, 1982 (U.K.), 1982 c.11.

29 Dolphin Delivery v. R.W.D.S.U. [1987] 3 W.W.R. 673.

30 W.S. Tarnopolsky, "A Comparison Between the Canadian Charter of Rights and Freedoms and the International Covenant on Civil and Political Rights", (1983) 2 Queens Law J. 211 at 226.

31 J. Humphrey, "The Canadian Charter of Rights and Freedoms and International Law", 50 Sask. Law Rev. 13 at 18:

There are however radical differences between the approach of the United Nations instruments and that of the Charter to the problem of how to deal with legitimate limitations and derogations. (section 1) That chosen by the authors of the Charter is by far the weakest from the point of view of the protection of human rights and fundamental freedoms.

32 The Individual's Rights Protection Act, R.S.A., 1980, c. 12; Human Rights Act, S.B.C. 1984, c. 22, as am.; Human Rights Act, C.C.S.M., c. H 175 as am.; New Brunswick Human Rights Code, R.S.N.B., 1963, c. H-11, as am.; Newfoundland Human Rights Code, S.N. 1988, c. 62.; Human Rights Act, S.N.S. 1969, c.11 as am.; Ontario Human Rights Code, S.O. 1981, c. 53; Prince Edward Island Human Rights Act, S.P.E.I. 1975, c.



72, as am. : Charter of Human Rights and Freedoms, R.S.O. 1977, c. C-12 as am; Saskatchewan Human Rights Code, S.S. 1979, c. S- 24.1; Northwest Territories Fair Practice Ordinance, R.O.N.W.T. 1974, c. F-2 as am.

33 The legislation is commendable in many respects. Recently, it has made well-publicized strides in dealing with systemic discrimination in some sectors. See C.N.R. v. Canadian Human Rights Commission [1984] 1 F.C. 96 , 85 C.L.L.C. 17,013, 6 C.H.R.R. d/2906 ( sub nom. C.N.R. v. Action Travail des Femmes), 20 D.L.R. (4th) 668, 61 N.R. 354, leave to appeal granted 64 N.R., 397. Leave to appeal varied 18th February, 1986; [1987] 1 S.C.R. 1114.(hereafter referred to as Action Travail )

34 More particularly, the focus of the legislation deals with anti-discrimination efforts in specific areas, perhaps in areas perceived as essential to the human condition- in the basic provision of accommodation, services and goods and in employment as a means to pay for these.

35 ICCPR, Article 2.1 For a similar setup see European Convention on Human Rights 1950 , E.T.S. No. 5; U.K.T.S. 70 (1950), Cmd. 8969.

36 Andrews v. Law Society of B.C., [1989] 1 S.C.R. 143, [1989] B.C.D. Civ 1831-01 ( S.C.C.) and Action Travail cases, supra n. 33 on the idea of enumerated classes. The Canadian Human Rights Commission ( "CHRC") 1985 Annual Report points out the federal Human Rights Commission still try to help out, informally in these situations.

37 The CHRC 1985 Annual Report at p.19 notes that often the Commission tries to provide assistance for difficulties outside the scope of the Act.

38 See Canadian Human Rights Commission's recommendation to Parliament to remove the cap, as noted in the 1987 Annual Report, p. 11.

39 Physical injury to or restraint of the person or property. As one example see Halushka v. University of Saskatchewan (1965), 53 D.L.R. (2d) 436 (Sask. C.A.) for the tort of battery for experimentation without consent.

40 Wilkinson v. Downton [1897] 2 Q.B. 57; 66 L.J.Q.B. 493; 13 T.L.R.388; 76 L.T. 493 (Q.B.).

J.G. Fleming, The Law of Torts, 7th ed.(Agincourt, Ont: Carswell, 1987) at 3.

41 K. Cooper-Stephenson, Tort II Casebook, College of Law, University of Saskatchewan, 1988) [unpublished] , Chap. 4 case materials.

42 J. Fleming, *supra*, n.40 at 7.

43 Systemic discrimination may not be deliberate but rather are institutionalized policies- e.g. height / weight restrictions whose effect is to discriminate, often occurring as a result of long established habit rather than prejudice *per se*. See Canadian Human Rights Commission 1985 Annual Report, p. 28.

44 Also, it is legal precedent that relies on damages as a primary remedy in civil actions, not tort law itself that demands it.

45 G. Williams, Foundations of the Law of Tort (Toronto: Butterworth, 1976) at 6.

46 For example, the American courts have been experimenting in the last few decades with "constitutional torts" and structural injunctions to limit the power of government in areas violating constitutional rights. The judiciary's efforts have met with outside criticism and internal reticence: see C. Whitman, "Constitutional Torts" (1980) 79 Mich. L. Rev. 5.

In the United States some judiciary have disliked the possibility of constant supervision of other institutions. Courts were at times of the opinion that this was too close to the legislative function and, without specific authorization, of the government was beyond the purview of the court. The Charter gives our judiciary that authorization in the public sphere. Canada under the Charter is tackling similar considerations: see

M. Pilkington's, "Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms", (1984) 62 Cdn. Bar Rev. 516.

As issues move into the private sphere, the prospect of a judiciary reviewing every private exercise of power seems even less tenable ( and perhaps worse, controlling by structural injunction): see R.A. Macdonald, *supra*, n 7.

47 Bhadauria v. Seneca College ( 1979) 11 C.C.L.T. 121 at 132 reversed by Seneca College v. Bhadauria , [1981] 2 S.C.R. 191 , (1981) 124 D.L.R. (3d) 193. Reference to the Supreme Court level decision will be to 124 D.L.R. (3d).

48 Now Ontario Human Rights Code, S.O. 1981, c. 53.

49 See W.W. Black, "Human Rights in British Columbia: Equality Postponed" 1984-5 Cdn. H. R. Yrbk. 219.

50 W.A. Bogart, "Appropriate and Just: Section 24 of the Canadian Charter of Rights and Freedoms and the Question of Judicial Legitimacy." ( 1987 ) Dal. Law J. p. 81 at 101.

For a fairly recent decision that has been decried as smacking of "neo-narrowism " see the comment to Attis v. District 15 Board of School Trustees Feb. 1989, Cdn. H. R. Adv. 7. In Attis, Q.B. Justice

Richard Miller interpreted New Brunswick schools as not being a "service" covered by the New Brunswick Human Rights Code.

51 In the few discrimination cases that came their way in the first half of this century, the judiciary typically upheld a laissez-faire philosophy. Historically, considering the social strata from which they came, this conclusion might not be surprising. However, it may be that the judiciary simply were expressing the attitude of the community at the time.

These are realities that may be hard for us, situated in the present day, to digest and it is easy to forget that in the 1920s, 1940s and 1960s the majority of Canadians were not unsullied in their treatment of minorities. See Walter Stewart, But Not in Canada! (Toronto: Macmillan, 1976). Indeed, it was not until 1969 until native Indians became enfranchised in Canada.

52 Supra, n. 45 p. 114.

53 Their "principles", however, were sometimes mixed with policy.

54 C. Allard, "Saskatchewan Human Rights Code can't muzzle student paper", *Lawyers Weekly*, 17 March, 1989, 11.

## CHAPTER 2: THE RELATIONSHIP OF HUMAN RIGHTS TO LAW

### I. Introduction

In an effort to better appreciate what may properly be expected of actors in regard to human rights (whether the actors are the legislature, the judiciary, or private individuals), it is appropriate at this time to engage in a general discussion of human rights. In particular, it is essential to understand both the meaning and the source of these rights. It is important to establish why human rights exist outside of particular moralities and how the rights should fit into our jurisprudence. This understanding then leads to conclusions as to what is necessary where violations have occurred.

Documents such as the Universal Declaration of Human Rights<sup>1</sup> and the International Covenants<sup>2</sup> typically contain a statement of rights to be protected, giving little by way of explanation of what a right is, what particular rights entail, from where such rights derive or why these particular rights are attributable to all humans. Writers or commentators on early human rights -style instruments, such as the French Declaration of Rights of Man and the Citizen or the American Bill of Rights, sometimes spoke of the ascribed rights being "self-evident". However, mere appeal to moral intuition seems unsettling and one is left searching for explanations. At the very least, it is safe to say that rights embodied in various documents or

charters of human rights have arisen in reaction to recognized deprivations. In other words, their evolution and recognition are ultimately caused by actions or treatments of individuals which came to be considered so unreasonable that it was necessary to have a specific declaration against that type of treatment.

## II. The Concept of Human Rights

While it may seem trite to express this, the term "human rights" combines two distinct ideas, "human" and "rights" which, when consolidated, establish a significance wider than either concept singularly. In the book Human Rights and Human Diversity, A.J.M. Milne has written that

if the adjective 'human' is to be taken seriously, the idea of human rights must be the idea that there are certain rights which, whether or not they are recognized, belong to all human beings at all times and in all places. These are rights which they have solely in virtue of being human, irrespective of nationality, religion, sex, social status, occupation, wealth, property or any other differentiating social characteristic.<sup>3</sup>

"Right", in combination with the concept "human", leads to certain assumptions of "inalienability" and "inviolability", because one can lose one's human rights no more than one can divest one's human nature.<sup>4</sup> The key notion in the concept of "right" is "entitlement". Where entitled to something, to be denied it by the action of someone is wrong and, if entitled to something, it is right or proper to have it.

It is always important to keep in mind that there may be differences between society's treatment of those with particular rights and the existence of the human rights. As with the simile of the thief who steals the pocketwatch, the lack of enforcement of the right does not remove the existence of the right.<sup>5</sup> The right of the owner subsists, even though she does not have the watch. More abstractly, the absence of de facto protection of a particular right, such as equality, does not negate the claim to that right or to its enforcement.

### III. Source of Human Rights

#### A. Kant and Rationality

From a natural law or rights based perspective if human rights exist solely by virtue of being human, then it must follow that something within the person, or more accurately something of the person, creates that right. Article 1 of the Universal Declaration offers one particular conception of that "something":

All human are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

It would appear that in this view, "human nature" (in particular, humankind's capacity for rationality) must somehow be intimately tied to rights.<sup>6</sup> Certainly for early writers, those capacities or reasoning and consciousness of self were connected to the concept of person and, in turn, to the concept of rights.<sup>7</sup> From rationality and self-consciousness came the capacity to choose, to make and act on one's own decisions; but in order to

effectively exercise that capacity, control and coercion had to be absent. Thus a right to autonomy was seen as necessary.<sup>8</sup>

Others have elaborated on these ideas of rationality and consciousness of self. Immanuel Kant argued that to act rationally was to act ethically.<sup>9</sup> However for Kant, human beings ought to act only on maxims or principles which have universal validity. These maxims must transcend the particular. If a principle ( or "categorical imperative") could not be adopted by everyone, it must not be adopted by anyone.<sup>10</sup>

One such categorical imperative was the "humanity principle" which dictated that one must "treat humanity, whether your own person, or in that of another, always as an ends withal and never as a means". Under this principle, to treat a person as a means would be to treat her as lacking in intrinsic value. Otherwise, if she had any value at all, it would only be extrinsic and instrumental. To treat one as having intrinsic value required that the person be respected as an autonomous agent, that is, a person capable of formulating and pursuing purposes of her own.<sup>11</sup>

Yet in the exercise of the human capacity for autonomy, there must necessarily be some restriction. In search of those restrictions, Kant maintained that no one must adopt as his own any purpose which could not be universalized. Applying this "universality criterion", Kant posited that, while it was logically possible for everyone always to respect everyone, it was logically impossible for everyone to act the contrary to this.<sup>12</sup> Hence, it followed that there was a universal obligation to

respect the personal autonomy of every person, including oneself. In turn, Kant based the attribution of dignity to the rational being on her autonomy or capacity for self-legislation or control of self.<sup>13</sup>

#### B. Beyond Kant: Recognizing Human Rights as Derived from "Community"

Since Kant's time, other writers have looked beyond our capacity to reason as a foundation of human rights. For them, the answer lay in the corollary of reason -- our capacity for action. Thus for these writers, "[t]he practical effectiveness of reason is manifested not in the capacity to reflect but in the power to originate or inhibit action."<sup>14</sup> For them, human action needed not only voluntariness (autonomy) but also intention to a goal which the person viewed as worth attaining.<sup>15</sup> From this perspective "the concept of a right is logically involved in all actions as a concept that signifies for every agent his claim and requirement that he have (or at least not be prevented from having) the necessary conditions that enable him to act in the pursuit of his purposes. So in this view, rights are necessary conditions that allow him to act."<sup>16</sup>

This argument has been taken even further. While acknowledging Kant's philosophy, A.J.M. Milne has noted that it has been seen deficient in some respects, inter alia, it is too closely tied to the concept of liberal democracy.<sup>17</sup> In Milne's view, in order to show that respect for certain rights is required by a universal minimum standard, it is necessary that there be a



standard. For Milne, this standard had its roots in the requirements of social life itself and was applicable not only within every human community, but also to all human relations.

Milne extrapolated from Kant's arguments, explaining more fully that nothing has intrinsic value unless someone values it. As all others may not value us, our intrinsic value came from the fact that we value our own lives. We need not have intrinsic value for others.

Milne located human consciousness of self and rationality in the person's ties with community, seeing Kant's analysis as being too closely related to a concept of the "individual" as a solitary soul and as operating without an understanding of the individual's ties with the community. For Milne there is also a social basis for the human identity that must be recognized. If she is to become a person in the fullest sense, there must be some form of community in which the individual can grow.<sup>18</sup>

Expanding on the arguments of others, Milne agreed that human action is purposive and intentional, but the worthwhile goal (the end in itself) that all human action seeks is social life, to be part of the social group.<sup>19</sup> It is within the group that the person establishes her identity. There is a consciousness of self that develops as part of community in which the person finds herself. She is part of, but at the same time distinct from, other people in the group and at the same time, part of, and distinct from all other groups. She develops her capacity for personal autonomy within the framework of social life, learning to adapt

her purposes and to associate with other people for the sake of shared purposes.

In this respect we have a paradox: it is only as a member of a community that a person can become an individual person and be in a position to pursue her self-interest.<sup>20</sup> In considering why there are and should be any rights at all, Milne responds that without rights there can be no human communities. Having rights is part of what it is to be a member of any community.

Being a member of a social group entails certain things as due to one from fellow members, and due to them from oneself. If this was not the case, one could be treated arbitrarily. One has rights and obligations vis a vis one's own fellow members. Thus, "in this elementary but fundamental sense, the notion of right is necessary for social life".<sup>21</sup>

However, irrespective of any particular form of community, if there is to be any social life at all, certain moral principles must exist. These principles create a "common morality"- a morality common to all communities irrespective of particular differences.<sup>22</sup> It is the "common morality" that establishes the moral foundation of human rights. Of these principles most, but not all, are human rights in themselves.

### C. In Further Explanation of the Relationship between Community and Human Rights

Milne notes that there are certain characteristics that every human group must possess in order to be a community. From every member is due a practical concern for the well-being

of all fellow members, one that is to be reciprocated. There can be no community where people are indifferent to each other's lot. They can constitute a community only to the extent that they are committed to the principle of fellowship and are willing to acknowledge an obligation to do their best to meet its requirements.<sup>23</sup>

As with Kant, Milne maintains that to act rationally is to act ethically. However, from Milne's perspective a person becomes a moral agent only through the course of growing up in a community. In becoming a moral agent, she learns she has obligations, one of which is to give precedence to the interest of the community over her self-interest whenever the two collide.<sup>24</sup> It is apparent that in this view the person is not atomistic, and personal liberty, while extremely important, does not necessarily sit at the top of any hierarchy of rights.<sup>25</sup>

Also, it is always every person's responsibility to assist in promoting the community's interest. That interest is one that is reducible to the common interest of the members, but not common self-interest as individual persons. This is because a person's self-interest is confined to what is best for her and for those to whom she is close. As the self-interest may be quite limited in time and narrow in focus, to attend only to it could jeopardize the community's well-being. Thus, this principle of social responsibility, which is an expansive right, sets limits on the member's liberty rights.<sup>26</sup>

Because each person is tied to the rest of the community through an impersonal system of division of labour, there cannot

be indifference towards the rest of the community. It is in the individual's self-interest that the community act efficiently and not threaten the person's conditions.<sup>27</sup> Undoubtedly, there will be those who continue to act only in their own self-interest. However, their actions will not be rationally defensible, in part because, if all members were to act in this manner, the community itself would necessarily fail.

In demanding that fellow members respect her rights, a member commits herself to acknowledging and to meeting her fellow members' correlative rights. This commitment is entailed by the "practical reason principle" whereby one treats "like cases alike". The person who demands that others respect her rights, while not respecting theirs is not treating "like cases alike".<sup>28</sup>

As a corollary to the member's social obligation within the community, trust is also necessary. Social obligations must be augmented by trust - the knowledge that other actors will acknowledge an obligation. This trust is one aspect of what Milne terms "beneficence" which requires we choose good over evil (or the lesser of two evils over the worse). Together with the "practical reason principle", beneficence and trust are the foundation of all rational action- moral, prudential, and instrumental.<sup>29</sup>

There are other essentials for any sense of "community" to exist. There is the need for respect for human life and the need for justice. With respect to justice, each member renders what is due to her fellowkind and receives what is due to her (and

fair treatment, for one thing, is always due a member).<sup>30</sup> It is important to point out that this idea of "justice "extends beyond particular justice, having distributive aspects to it as well.

To provide personal security for social life, there is the additional need for freedom from arbitrary interference. As well, there must be truthfulness both in action and in word. This requirement not only forbids duplicity, but also helps to uphold obligations. A community can handle some dishonesty, but it cannot survive where there is too much. Civility is also necessary for co-operation. Civility requires that one treats the other with respect in all dealings, so that one cannot shock, humiliate or insult others.<sup>31</sup> Lastly, if the community is to survive it cannot afford to neglect the well-being of the next generation.

#### D. From Principles of Common Morality to Human Rights

Of the nine principles, Milne pointed out that social responsibility is an obligation to the community, but confers no rights on the individual. Fellowship, also, is not a right in itself. One can give fellowship, but cannot demand it of others.

Each of the other principles must be modified somewhat to form what may properly be called human rights. These become: rights to life, to justice in the form of fair treatment, to aid, to freedom (in the negative sense of freedom from arbitrary interference), to honorable treatment, to civility and, in the case of children, to care.<sup>32</sup> Of these, the right to fair treatment is seen as the primary right because at least it can always be

respected when other rights come into conflict. Whenever sacrifices for the community must be made, they must be made in fair allotment.<sup>33</sup>

Of the rights, only the the obligation to beneficence is always absolute. According to Milne, no one is entitled to release another from it because that right is the right to have all the other rights respected. If one does not obey this obligation, one is not choosing the lesser evil. <sup>34</sup> In this sense, beneficence is redundant because it gives no more than what the other rights have already given and, when any other right is violated, it is violated.

#### E. Justice as a Human Right

Justice as a human right is formulated according to the "proportionate equality principle": treat equal cases equally and unequal cases unequally and where treated unequally that treatment must be proportional to the comparative inequality.<sup>35</sup> As a human right, justice entitles every human being to be treated fairly, which in turn is the right to have proportionate equality applied properly, whenever and wherever applicable. This obligation of equal treatment is one that all are under when involved in making allocations, in making assessments or in competitions. The right is violated whenever its correlative obligation is not met -- whenever equals are treated unequally, or unequals equally. When an eligible person is excluded, the allocation has been unfair in that the others have received

greater benefits or greater burdens than they otherwise should have. 36

It is apparent that the definition would be excessively narrow if the principle was regarded as implying only formal equal treatment, and not the more expansive view of attainment of substantive or material equality. Recognizing this, Milne has acknowledged that what is involved here is not only a matter of equal treatment of essentially equals, but also of unequal treatment of essentially unequals.

Within Milne's framework in differentiating on an unjustifiable basis the offender violates the human right to fair treatment, because equals are treated unequally:

As fellow human beings the members of both groups are equal in moral status, but the treatment which the members of the dominant group accord to the members of the subordinate group is different from and inferior to that which they accord to themselves. Purely physical differences such as colour, as distinct from differences of character and capacity, logically can have no moral relevance and so cannot justify unequal treatment...justification of discrimination... is morally defective. It fails to meet the requirement of the universal minimum moral standard. (emphasis added) 37

As will be detailed in later chapters in this paper, what constitutes an "unjustifiable basis" for treatment is where there is a lack of sufficient connection between the treatment and the ground of differentiation. Consequently, this proposition is closely tied to the definition of discrimination at international law which states that discrimination occurs "when in a given case no sufficient connection exists between the equality or inequality aspects on the one hand and the nature of the

treatment on the other."<sup>38</sup> International law recognizes that sufficient connections exist only where the classification is relevant to the subject, fairly related to it, not capricious or arbitrary, but instead reasonable and just.<sup>39</sup>

#### IV. The Significance of Milne's Approach

One significance of Milne's work is that it sets the parameters for all types of human interaction. The principle of social responsibility becomes applicable to any form of community--familial, national, or international,<sup>40</sup> and, where rights come into conflict, resolution can be found by looking to what accords best not only with the well-being of that particular community but also the larger community.<sup>41</sup>

For example, a well-ordered society needs peace and security, but it also needs justice. Whereas Kant emphasized that one should not interfere with the liberty of another, Kant's proposition says nothing about how we should treat that other person or group. Instead, from Milne's perspective, those standards come from the common morality principles.<sup>42</sup> Specifically, proportionality would demand that unequal cases be treated only unequally in proportion to the inequality.

Milne's approach helps to respond to questions that sometimes seem intractable -- such as "Where two rights are in conflict, which of the two rights will give way?" The "intractable" often becomes less so when set against the standards of the larger community, with the experience of that community



establishing an understanding of what is "objectively" discriminatory or unfair.

#### A. A View of Law, Morality, and the Role of Government

Milne's paradigm also establishes a framework in which to understand the responsibilities of bodies, whether public or private. Within Milne's framework, community obligation becomes the key to both morality and law. Of the two, morality is logically prior to the law because there can be morality without law, but not the obverse. While law can create particular obligations, it cannot create obligations in general.<sup>43</sup> As Milne puts it, "a law prescribing obedience to the law would be pointless. It presupposes the very thing it intended to create: the general obligation to obey the law."<sup>44</sup>

Morality is also logically prior to government in that morality provides the necessary basis for trust between community members. Without morality they would not be able to carry out the co-operation which makes up the corporate life of the community. To be a member of a community is, inter alia, to be a moral agent.

Every government, whether or not it acknowledges it, is subject to the requirements of universal morality. The requirements oblige the government to do as much as it can to protect the human rights of everyone in the country and therefore never to do anything to violate the human rights of those with whom it has dealings.<sup>45</sup> That violation of rights can result from either misfeasance or from non-feasance. In this

view, government as an agent of the community, must be committed to the union of the common morality with the morality particular to that group or area.<sup>46</sup> The scope of government's authority is limited to that which is necessary to the community's interest, which is also the interest of members as community members, not as private persons.<sup>47</sup> In searching for that which will accentuate the well-being of the community the government does not advance a utilitarian interest, nor a majoritarian interest, as either may not be conducive to the overall well-being of the community.<sup>48</sup>

#### B. Role of the Judiciary as Part of "Government"

From a natural law perspective, the person has rights that are not necessarily conferred by society, but are to recognized by it. From this perspective comes the conclusion that the full purpose of government is to ensure that these rights are instituted among people. <sup>49</sup> As well, from this type of analysis, it becomes easy to suggest that the first duty of both lawgivers and magistrates is to assert and protect natural rights.<sup>50</sup>

Where a country such as Canada has acknowledged nationally and internationally that there are human rights obligations, it has committed itself to a statement of essential values upon which society is required to be based. In this view fundamental rights form an integral part of the general principles of law, the observance of which the court must heed. This becomes the philosophical and jurisprudential backdrop against which rights claims must always be considered.

This point of view stands in sharp contrast to positivism which maintains that the appropriate role of the government is to establish rights, and the role of the judiciary is to interpret what has been granted. Positivists stress that the task of the judiciary is to find the law "as it is, not as it should be." Positivists will accept that in last resort, where the legislature has not spoken or has left a gap, the judiciary can act in a manner similar to that of legislators. In such cases, the judiciary are to see that the law interpreted was made to accord with "prevailing morality or strong or preponderant opinion". In this view, it becomes the judiciary's function to legislate, only being guided by public policy--so that the law accords with the dominant social and political doctrines.

By way of comparison, in Milne's view, the responsibility of "government" always belongs each of the legislative, executive and judicial fora. While each forum may fulfil that duty in a slightly different manner-- the principles of common morality should always guide their decisions. Under Milne's analysis, the judiciary are not mere interpreters of law, they are the guardians of human rights. Their first duty is to ensure that no law prescribes that which is incompatible with human rights.<sup>51</sup> Judges have a responsibility to "capture", which is to say, to ensure, the rights people actually have.<sup>52</sup>

For Milne there is nothing wrong with positive law. It provides security for the community.<sup>53</sup> However, positive law and the concepts underlying it ( "rule of law",<sup>54</sup> "equality before

the law",<sup>55</sup> and "supremacy of the law"<sup>56</sup>) must be interpreted within the universal morality.

It is apparent that, in contrast to the predilection of positivists, natural law or rights based theories must be concerned not only with formal but also with substantive justice. For "by placing reliance on a catalogue of specific freedoms and providing machinery for their judicial interpretation and application, no less is being provided than a statement of essential values, upon which a particular society or society in general is required to be based."<sup>57</sup> In this view, fundamental rights form an integral part of the general principles of law, the observance of which the court must heed.<sup>58</sup>

### C. When Rights are Violated

This rights- based paradigm also establishes an explanation of what should happen when a right has been violated and harm has occurred. Because a right is that to which one is entitled, the violation of the right requires the redressing of the violation, a remedy in essence.

#### 1. "Remedy"

To remedy, literally, means to counteract an error. However, one cannot talk of remedy in vacuo. Instead, it is imperative to consider both the nature of the particular right and the goals in respect of rights in general. Together, these will help to establish standards of what the counteracting efforts should be. The nature of the right will depend on the right to

which we are referring. The appropriate remedy of a violation of the right to life or security of the person will necessarily differ from that of rights of equality or privacy.

The overall goal in respect of human rights is the assurance of the rights for all people, and with that, the acknowledgement of each person's inherent worth within the community. Assuredly, those goals would probably be best served by the creation of an environment conducive to the fostering of rights. The best "remedy" for a right would be to never have it violated in the first place. Barring that, however, whatever lesser solution is accepted should at least illustrate the principles of beneficence (choose good over evil or the lesser of two evils)<sup>59</sup> and practical reason (treat equal cases alike).<sup>60</sup>

## ....2. "Effective Remedy"

It must be remembered that in the protection of human rights we are searching not only remedies but "effective remedies." That term can mean a variety of things. On the most minimal level, "effective" means that the procedure at least does what it is supposed to do so that the judges impartially follow the rules and regulations established for them without regard to particular merit of the same.

However, as important as this requirement is, such an approach would be unduly simplistic and would not necessarily accord well with a rights-based perspective. The rules set for the judicial or administrative body might themselves be excessively narrow, thwarting the goal of rights protection. For that

reason effective remedy must look beyond procedure to the substance of what is given.

As will be discussed in more detail below, "effective" must also mean effective in respect of this person or group, responsive to the particular harms suffered by them. At the same time, to the victim of a wrong, "effective" must mean that which is realistically accessible as a remedy.<sup>61</sup> In that regard the cost in terms of time, money, or other resources must be considered.

One additional point should be made. As we are talking the rights of all people at all times, not only is the result in any one case important, but also the means. Even though one may have violated the rights of another, the violator's own rights are not thereby negated. Justice is still owed to that person and the process of giving remedy always must recognize that.

### .3. Approaches to Remedies

#### a. Particular Justice

Theoretically, when dealing with human rights, one might assume that it would be best would be to return the person to the position in which she or he would have been had the incursion not occurred. Over the centuries theorists have concentrated on that approach. For example, the Aristotelian concept of "particular justice", focuses not on any intention of the actor to harm the other party, but on the presumption that actor has gained a benefit from his act, to the detriment of, or at the expense and harm of the other person. <sup>62</sup>

When there was a gain, the Aristotelian theory of corrective or rectificatory justice examined the position of the parties anterior to the "transaction" as equal and then restored them to this antecedent equality. In law, this was accomplished by transferring resources from the defendant to the plaintiff, so that the gain realized by the defendant was used to make up the loss of the plaintiff.<sup>63</sup> As far as possible, application of the theory would use money to restore the plaintiff's pre-event position. Basically, the idea was to put one in the position as if one had not sustained the wrong.<sup>64</sup>

As far as it goes, this perspective coincides with A.J.M. Milne's provision for proportionate equality ( or "each according to his due") and with his concept of justice. According to Milne, as a matter of justice, compensation is due from one party to another when, without an adequate excuse, the former has harmed the latter. However, Milne elaborates on the relationship:

But justice also requires that the compensati  
equality must be applied in deciding  
the kind and amount of compensation.  
It must be in proportion to the harm for  
which the offending party is to blame.  
(emphasis added)<sup>65</sup>

Thus, both the amount of blame and the seriousness of the harm must be assessed. Milne stresses that the blame should not be exaggerated, nor the seriousness of the harm underestimated. Of course, it is imperative that one, therefore, look to exactly what the harm is.

Once again, the answer to that, in part, depends on the viewpoint one is taking. Atomistically, the harm may be framed in respect of its effect on this person alone. To that narrow end, the compensation is only to repair the plaintiff's loss. However, from a rights-based perspective, the harm from a violation may extend beyond the particular person or group to the community at large. For that reason, among others, it also may be essential to condemn a defendant's conduct. These are two different ends for one money judgment and it is important to keep clear what exactly is being compensated.<sup>66</sup>

Within a rights-based perspective, the plaintiff's right to compensation is always important and all the harms to the person should be addressed. Milne stresses

It is part of the concept of compensation that the kind and degree must be in proportion to the culpable harm suffered. Too much, too little or the wrong kind is not compensation properly so-called. The idea of fairness is thus integral part of the concept of 'compensation', ...[thus] decisions about the kind and amount of compensation must be made according to the proportionate equality principle. <sup>67</sup>

Proportionate equality in respect of compensation requires

- a) that each relevant consideration be considered positively or negatively, according to whether it is favorable or unfavorable;
- b) that those of equal worth must be rated equally, those of unequal worth, unequally, in proportion to their unequal worth; and
- c) that those which are unfavorable be rated negatively in proportion to the degree to which they are unfavorable.<sup>68</sup>



At this preliminary stage it is suggested that in the assessment of any remedy to a rights violation, among the "relevant considerations" should be

- a) the harm done to the plaintiff- that including all types reasonably flowing from the "injury";
- b) the harm occasioned to the person or the group in terms of social perception;
- c) time and money expended in terms of bringing the complaint; and, very importantly,
- d) the character of the offender ( whether it is an individual or an institutionally organized body ).

This last consideration is important in terms of the harm that has occurred and the perceived legitimacy of the actions.<sup>69</sup> Milne's analysis would also suggest that it is important to attend to the positive considerations as well-- for example, whether the defendant has already altered his behavior and whether he has already "paid" in some non-monetary sense such as adverse publicity.

#### **b. Beyond Particular Justice**

At first blush there may be problems focussing solely on particular justice in respect of human rights and remedies. Firstly, it should be noted that to the extent "compensation" relies exclusively on money, putting the harmed party back in what should have been the person's "true" position may ignore

the goal of "assuring" the right.<sup>70</sup> Money may effectively tackle harms flowing from the violation, but it is not the same as having the right itself.

For example, in the area of discrimination in employment, monetary compensation may offer some form of remedy, but money is not the same as having the opportunity to apply for a position or actually having the job. In many instances a true remedy may need to be something similar to specific performance- actually giving that which was taken.

Secondly, the "gain" by the particular defendant may not be "equal" to the loss by the victim.<sup>71</sup> Instead the "gain" may be one that has gradually accrued over the centuries. A common example of this is the continuing wage inequities between men and women, not necessarily by any intended "malice", but partly through the ghettoization of women within in certain categories of employment and concomitantly by the ranking of certain "feminine" categories of work as less "valuable" in worth. Here, what may be required is recognition that the starting point is not equal for all and remedy may entail a search for methods that will achieve re-distributions that are more equitable.

Moreover, the extent to which a remedy is limited to "particular justice" and the extent to which a response concentrates only on this individual in regard to this particular violation the remedy will be left short of the goal of assuring the right in the future. This is because particular justice, so construed, is unduly atomistic and fails to understand that "community" and "individual" are integrally tied .

Additionally, any reliance solely on particular justice means those whose rights have been violated will always be in the process of "catch up ", by virtue of the fact they have to seek a remedy in the first place for what should have been theirs by right. This type of justice fails to heed the goal of prevention of future rights infringements by other actors, an objective that is imperative for the community's survival. A society that is constantly battling past violations leaves itself open to perpetuation of the wrongs, as only the smallest segment of violators will be caught and even fewer will be made to offer redress for the wrongs. Constantly fighting past infringements may also be a poorer use of resources than efforts that work to assure the violations do not occur in the future. It becomes obvious that remedies must meet these concerns. With the above points in mind, an alternative to compensation should be considered -- that of sanctions which will now be briefly discussed.

### c. Sanctions

Within the community version of rights-based perspective, the protection of the community from further infringements is also crucial. As previously mentioned, as important as compensation is, it is nevertheless usually backward looking (or reactive). For the most part it addresses only that particular violation. Even that victim may find herself subject to the same kind of violation elsewhere. For these reasons, among others, it is important to discuss remedies, such as sanctions, that can also

work to the future and gain the attention of the larger community .

J. Finnis has suggested that sanctions

are required in reason to avoid injustice, to maintain a rational order of proportionate equality, or fairness, as between all members of society. For when someone, who really could have chosen otherwise, manifests a preference ... for his own interests, his own freedom of choice and action , as against the common interests... then in and by that very action he gains a certain sort of advantage over those who have restrained themselves... If the free-willing ...were to retain advantage , the situation would be as unequal and unfair as it would be for him to retain the tangible profits of his crime ( the loot , the misappropriated fund, the office of profit, ...)... Punishment, then characteristically seeks to restore the distributively just balance of advantages...<sup>72</sup>

Sanctions also stand as evidence of a community's umbrage to the violation. For each of these reasons sanctions should always be an important consideration in the evaluation of effective remedies. Chapter 5, in particular, examines sanctions in the form of aggravated or punitive damages.

## V. Conclusion

This chapter has covered diverse ground. Using the works of A.J.M. Milne as a touchstone, the chapter has considered the nature of human rights and has offered a framework in which to understand both individual and government responsibilities in respect of these rights. It has underscored the need for

to understand both individual and government responsibilities in respect of these rights. It has underscored the need for more than just a positivist role for the judiciary in the protection of rights. Lastly, the chapter has touched upon considerations of what will constitute "effective remedies", looking not only to particular justice but beyond. Against this background the following chapter examines the measures Canada to date has taken in the protection of these rights.

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CHAPTER 2 FOOTNOTES

- 1 G.A.O.R. 217A (III), 3rd Sess., Part I, Resolutions, p. 71.  
( hereafter referred to as the Universal Declaration).
- 2 U.K.T.S. 6 (1977), Cmnd. 6702; 61 A. J.I.L. 870 (1967).( hereafter referred to as the Covenants).
- 3 A.J.M.Milne, Human Rights and Human Diversity (Albany: State University of New York, 1986) at 1.
- 4 J. Donnelly, The Concept of Human Rights (New York: St. Martins Press, 1985) p. 34
- 5 Ibid. at 17.
- 6 Ibid. at 30. Donnelly instead sees human rights arising out of human action. That action is a choice of a particular moral vision of human potentiality.
- 7 John Locke (1632-1704) defines a person as "A thinking intelligent being that has reason and reflection and can consider itself, as itself, the same thinking thing in different times and places" in P. Singer, Practical Ethics (Cambridge: Cambridge University Press, 1982) at 76.
- 8 P. Singer, *ibid.* at 83.
- 9 P. Singer, *ibid.* at 204.
- 10 Milne, *supra* n. 3 at 79 defines "categorical imperatives" as an imperative that people cannot release themselves except by complying with them.
- 11 A.J.M. Milne, *ibid.* at 82.
- 12 To treat everyone, including himself, as a means to an end would be to treat everyone as a slave. That however would be impossible because for there to be slaves there must be slaveowners and a slaveowner cannot logically be one of his own slaves. Hence it is impossible for everyone to treat every person, including himself as a means to an end.
- 13 Dignity (a characteristic typically used in human rights discourse) signifies that by virtue of natural law the person has the

right to be respected, that she is the subject of rights and possesses rights.

14 Encyclopedia of Philosophy (New York: Macmillan, 1967). Vol. 3-4, "Kant, Immanuel" at 317.

15 Alan Gerwith, p. 10.

16 Alan Gerwith, p. 16.

17 Milne, Freedom and Rights (London: George Allen and Unwin, 1968 ), at 59. It is Milne's impression that because man can reason does not give us standards by which he must reason. All future reference to this book will be cited as Bk II.

18 Milne, supra n. 3 at 4.

19 Milne, Bk II at 34.

20 Milne, Bk II at 43.

21 Milne, supra n. 3 at 7.

22 Milne, Bk II at 57. In contrast, there are also particular moralities in communities. For example the consider the institution of pardah in Islamic communities.

23 Milne, supra n. 3 at 38.

24 Milne refers to this as "the principle of social responsibility."

25 Indeed under this view it probably isn't appropriate to think of terms of hierarchy of rights.

26 A.J.M. Milne, Bk II at 132.

27 A.J.M. Milne, supra n. 3 at 40.

28 A.J.M. Milne, BK II at 143.

29 A.J.M. Milne, Bk II at 125.

30 A.J.M. Milne, supra. n. 3 at 46.

31 A.J.M. Milne, supra n. 3 at 55.

32 A.J.M. Milne, Bk II at 139.

33 A.J.M. Milne, supra n.3 at 52.

- 34 A.J.M. Milne, Bk II at 126.
- 35 A.J.M. Milne, *supra* n.3 at 49.
- 36 A.J.M. Milne, *supra* n.3 at 51.
- 37 A.J.M. Milne, Bk II at 166.
- 38 E.W. Vierdag, The Concept of Discrimination in International Law. ( The Hague : Nijhoff, 1973).
- 39 Ibid.
- 40 However each must be a community as such in that its people must work together.
- 41 Consider this example:

A person has worked for an airline for ten years when suddenly the employer ( responding to the highly publicized accounts of the allegedly intoxicated Exxon captain) demands drug-testing of this employee and all others hired . While on the one hand, it would appear that this is an arbitrary interference with this employee, the employer also traditionally is seen as having considerable liberty as to the management of the business enterprise. Whose right should give sway is not readily apparent. However, social responsibility and its correlates, mean that, to some extent, we face having our activities organized. (A.J.M.Milne. p. 154) If the employee was an airline pilot, there would be reason to appeal to the well-being of the community. Firstly, the community's interest cannot be confined to conditions favorable to commercial prosperity- the community needs also include numerous non- commercial considerations, inter alia, health, safety, conservation and education. (A.J.M. Milne, *supra* n. 3 at 168.) Community interest would suggest that while the privacy of the individual is very important for autonomy , where the community is placed at a significant risk, interference with the employee may not be arbitrary or unjustifiable. Yet , even if there was an overriding interest on the basis of security in the case of the pilot, that still would not justify the use of the test for any other purpose. The rights of the employee and the employer subsist, but they are framed within the context of the community. Proportionality



would say that drug testing would be unacceptable in the case of the airline ticket counter person whose position does not significantly place the public at risk .

Compare with the approach in Policy 88-1 CHRC Annual Report, p. 11

42 A.J.M. Milne, *supra* n.3 at 85.

43 A.J.M. Milne, *supra* n. 3 at 28.

44 A.J.M. Milne, *supra* n. 3 at 28.

45 A.J.M. Milne, Bk II at 155.

46 Quebec, of course, would be one example of where this has not occurred . We can see the difficulties that can arise when a particular community becomes too narrowly focussed on itself. Although not the only culprit, Quebec, in the name of "nationalism" , has increasingly been accused of racism, in that it is seen as pushing aside all other cultures in the pursuit of becoming more "French". See "Report paints Quebec as racist", Vancouver Sun, March 23, 1991, p. A12 referring to a report submitted by nine ethnic groups to the federal Multiculturalism Minister.

47 Some human rights theorists attribute this concept of limited government to the fact that there are certain minimal needs natural to humans (among them being food, water, and society in the sense of social relations) that limit the arbitrary will of the legislature. Without having these needs met, people cannot exist and as existence itself is desirable, interference with these "goods" is immoral and unnatural. P.E. Sigmund, Natural Law in Political Thought (Washington:Winthrop, 1971) at 169.

48 Once again, it is important to stress this is not a utilitarian approach - sometimes justice demands taking care of the individual, even if other actions might marginally increase the general welfare of the community-e.g. even if not having wheelchair ramps might leave more money for other worthy projects.

49 H. Cleveland, "The Chain Reaction of Human Rights" in A. Henkin (ed.) Human Dignity :The Internationalization of Human Rights (New York: Aspen Institute for Humanistic Studies, 1978) at 6.

50 J. Donnelly, *supra* n. 4 at 22.

51 A.J. M. Milne, at 161.

52 See Chap 4 "Hard Cases" in R.Dworkin , Taking Rights Seriously (Cambridge, Mass.: Harvard University Press, 1977) at 80 ff.

53 A.J.M. Milne, Bk II at 106.

54 Rule of law carries several different connotations-  
 a) independence of the executive branch of government  
 b) an ideal of rationality in the ordering of society, as opposed to arbitrary decision-making.

From S. M. Waddams, Study of Law, 2nd ed. (Toronto: Carswell, 1983) at 8-9.

55 Equality before the law- no one is above the law and all are equally subject to it.

56 Supremacy of the law- where legal obligations are paramount to other obligations.

57 Lord Lloyd of Hampstead, Introduction to Jurisprudence (4th ed.), (London: Stevens & Sons, 1979) at 100.

58 Ibid. at 101.

59 There are several ideas that surround this, one being that the right should be met with no greater remedy or resource and no more complicated a procedure than the situation actually warrants.

In the Charter area, similar direction has been occurring. With respect to the Charter there is a feeling that the court should only interfere where special circumstances merit so that if a lower court has jurisdiction and power to grant relief, the superior court should refuse to grant jurisdiction. The superior court becomes more of a court of last resort, if not last resort. Re Krakowski and the Queen (1983), 4 C.C.C. (3d) 188, 41 O.R. (2d) 321 (Ont. C.A.). This deference of course is only justifiable where the other body is capable of providing an effective remedy in the first place.

60 An interesting description of adequate remedies in the area of the Charter is given by M. Pilkington's, "Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms" (1984) 62 Cdn. Bar Rev. 516, 519. In her view, the framework should be consideration of a remedy that would :

- 1) most effectively redressed the wrong suffered by the plaintiff,
- 2) deter future infringements and ensuring future compliance, and
- 3) interfere as little as possible with private responsibilities.

Because this paper is based on the premise of private responsibilities in, and of themselves, may not be a legitimate reason for violating the rights of others, Pilkington's last consideration will have less sway here.

61 In the area of the Charter see Lamer's dissent in Mills v. The Queen (1986), 52 C.R. (3d) 1 at 92-100; 26 C.C.C. (3d) 481 at 481 at 565-571; 29 D.L.R. (4th) 161 at 245-252; (S.C.C.) in which it is emphasized that a remedy should be easily available and not smothered in procedural delays and difficulties.

62 R. McKeon (ed.), Introduction to Aristotle, (New York: Random House, 1947) p. 401.

63 E.J. Weinrib, "Towards a Moral Theory of Negligence Law", (1983) 2 Law and Philosophy 37 at 38:

"The wrongful act is reckoned to have brought equal gain to the wrongdoer and loss to the victim. It brings A to the position A + C and B to the position B-C...The corrective justice will be the intermediate between the greater and the less."( Cooper-Stephenson)

64 One perceived disadvantage to emphasizing "particular justice", is that it seems to assume that everything was equal before hand and we are perpetrating the inequality. On occasion human rights commissions have touched upon "distributive justice" - e.g. Action Travail. Arguably, where tort law moves into the areas punitive or exemplary damages there is room for a form of distributive justice.

65 A.J.M. Milne, *supra* n. 3 at 56

66 C. Morris, "Punitive Damages in Tort Cases", (1931) 44 Harv. Law Rev. 1172 at 1175 - 1181.

67 A.J.M. Milne, Bk II, at 175, n.6

68 A.J.M. Milne, n. 3 at 49.

69 At the same time it is also relevant to ascertaining levies that will succeed in altering conduct. Traditionally, courts have allowed the plaintiff to prove the defendant's wealth before the court would establish punitive damages because a penalty that would cause the poor or individual person to reform would likely make little impression on the rich or corporate institution (*supra* n. \*\* at Clarence Morris, p. 1191)

The actual role of publicity will become very important later on in examining "compensation" by human rights legislation.

70 Milne acknowledges this to some degree when he speaks of "kind and extent of compensation".

71 Consider for example the proprietor who discriminates by paying certain groups of his employees less. The group have lost wages in comparison to their co-workers, plus endured loss of self-esteem, respect and dignity. The owner may have gained nothing monetarily

or may have gained considerably. He may have been more competitive as a result of his actions, increasing his profits not only by the amount of the wage differential but also by the profits garnered from his more competitive position.

72 J. Finnis, Natural Law and Natural Rights, (Oxford: Clarendon Press, 1980), p. 263.

## CHAPTER 3

### HUMAN RIGHTS LEGISLATION

#### I. Introduction

Canada has been addressing human rights matters in one respect or another ever since the first Legislative Assembly in 1793,<sup>1</sup> but that response, typically, has been haphazard and oftentimes inconsistent. In part, the reason for this is the country has responded only to particular subject matters<sup>2</sup> or to particular problem areas.<sup>3</sup> This has allowed issues to become compartmentalized, without a view to seeing the situations as any part of an overall manner of dealing with human beings. The reasons for this piecemeal approach are open to conjecture, but at least two come easily to mind. The first one is functional and the second is socio-political.<sup>4</sup>

At Confederation, the interest of then-to-be federal and provincial governments was solely the manner in which power was to be divided between the two. In the end, the federal government was accorded control over matters with a national context or nature.<sup>5</sup> The provinces were given control, inter alia, over matters more closely tied to the particular region such as "local works and undertakings"<sup>6</sup> and "property and civil rights".<sup>7</sup> In their respective divisions, each government could also be seen as having a residuary power.<sup>8</sup>

What is readily apparent is that the Constitution Act, 1867 did not give exclusive legislative jurisdiction over human rights to either level of government.<sup>9</sup> Considering the period,

that was as might be expected- improving the human condition was not discussed in terms of nominate human rights.<sup>10</sup> However, this later meant that human right discourse was reduced to specified activities that were subject to either federal or provincial legislation, depending upon whether the conduct to be regulated fell within the purview of matters coming within the legislative authority of the federal or a provincial government. As will be shown, it is Canada's federal nature that has created significant problems to the area of human rights, particularly in regard to the scope of the rights and remedies available, but also in terms of attitude.<sup>11</sup> It should also be noted, however, that our internal difficulties flowing from federalism hold no weight, either ethically or in terms of international law, when we are deemed in violation of our duties.<sup>12</sup>

## II. The Functional Problem

While it might appear that by virtue of s. 92 (13) (property and civil rights) the provincial government had exclusive jurisdiction over many of the matters we might consider as "human rights", this is a common misconception. "Civil rights " in this context are not the same as "human rights" or even "civil liberties". The use of the word "civil rights" in s. 92 (13) actually refers to matters between individuals, as opposed to matters between the individual and government.<sup>13</sup> Civil rights as construed by the British North America Act "comprise primarily proprietary, contractual or tortious rights: the rights

exist when a legal rule stipulates that in certain circumstances a person is entitled to something from another."<sup>14</sup> In contrast, civil liberties (which form one part of human rights ) exist where there is an absence of legal rules: whatever is not forbidden is a civil liberty.

Analysing the focus of human rights codes to date, it may be pointed out that the legislation has primarily concentrated on matters dealing with employment, wage discrimination, contractual rights and access to goods and services, all of which fall within the class of interests of "property and civil rights" and presumptively within provincial jurisdiction.<sup>15</sup>

In contrast, particular businesses with a national character such as railways, telephone companies or airlines, are subject to federal jurisdiction because of that national perspective. Federal employees and the federal government as employer will also come within the scope of the federal human rights legislation. The situation becomes more convoluted when trying to determine if the matter is in relation to a federal power under section 91, such as " in relation to" federal works, undertakings or business, or federal crown property, natives) as opposed to merely affecting property and civil rights. In the former situation the federal government again will be accorded jurisdiction over the subject matter. <sup>16</sup>

Canada's problems deriving from the constitutional division of powers are understood and acknowledged by human rights commissions. The commissions will be the first to admit that working one's way through this maze of jurisdictions can

be both confusing and disconcerting for complainants.<sup>17</sup> A legislated deference whereby human rights commissions will decline jurisdiction where it is felt that the matter before them is one better handled by other boards or panels further compounds the matter.<sup>18</sup>

Aware that the constitutional division of powers can create lacunae, governments, from time to time, have attempted to ensure that a particular problem is resolved by at least one level of authority. For example, when it was felt that neither Ontario's Code nor the Criminal Code covered the problem of recorded telephone hate messages, the Ontario Attorney General called upon the federal government to deal with the problem.<sup>19</sup> However, what happens if the other government either fails, ignores or neglects to act, becomes problematic .

#### A. An Illustration of the Difficulty

Scowby v. Glendenning<sup>20</sup> demonstrates some of the difficulties of federalism for the protection of human rights in that provincial legislation may not cover certain federal actors or may not give rise to jurisdiction over certain federal bodies even where the violation occurred within the province.

In Scowby certain members of the Saskatchewan RCMP were under investigation by the Human Rights Commission after allegations that the R.C.M.P., in the course of arresting a member of their party, needlessly subjected a group of natives to indignities. The R.C.M.P. refused to co-operate and, instead, went before the court asking for a writ of prohibition, claiming



that the Saskatchewan Human Rights Board lacked the jurisdiction to investigate or settle a complaint lodged by the natives against the R.C.M.P.

The case eventually went to the Supreme Court of Canada. There, it was decided that s.7 of the Saskatchewan Code<sup>21</sup>, under which the human rights commission was pursuing the complaint, was "essentially criminal in nature". Consequently, that provision of the Code was constitutionally invalid, as it fell under the federal head of power. At first blush, section 7 of the Code, which states that every person shall be free from arbitrary arrest and detention, sounds a lot like s. 9 of the Charter.

The Supreme Court decision was in marked contrast to the approach of the Court of Appeal<sup>22</sup>, which concluded that "in light of the broad spectrum of provincial civil or tortious liability involving wrongful physical interference of the other" [which the court saw as properly within the province's ambit], and in light of the educative and promotional responsibilities of the human rights commission, in this instance, any action performed by the commission was merely incidental to its power, and it could not be seen as acting in a superior court function.

In light of the fact that the matter was not later tackled by the federal government human rights board, Scowby would seem to restrict the ability of human rights boards to do justice in areas where there might be seen to be some minimal overlap between the federal and provincial concerns. Individuals or

groups who are supposed to be protected by human rights legislation end up losing out.

### III. The Socio-political Problem

From a "socio-political" perspective, when discourse is entrenched in division of power dialogue rather than in a discussion of rights, it allows human rights issues to be viewed simply as a jockeying between federal and provincial powers.<sup>23</sup> Certainly, we have seen that until the advent of the Charter, cases coming before the courts involving human rights issues were resolved principally on the basis of being intra vires or ultra vires a particular government.<sup>24</sup>

Thus, in the past, a law prohibiting Chinese merchants from employing whites females, although patently racist in intent and effect, was legally within the jurisdiction of the Saskatchewan government in the early 1900s.<sup>25</sup> Likewise, legislation against communal ownership of land which affected the religious beliefs and economic well-being of only Hutterites was legally within the jurisdiction of the Alberta government.<sup>26</sup> In British Columbia it was ultra vires the provincial jurisdiction to prohibit the employment of Chinese in coal mines,<sup>27</sup> but it would not have been ultra vires the jurisdiction of the federal government. It is appalling that the courts upheld these pieces of legislation as within the jurisdiction of either level of government, allowing the conclusion to be drawn that the

blatantly discriminatory practices were within the legitimate power of any government.

Moreover, this approach directs the discourse away from a concern for "rights", i.e. things inherent to the person. Once a subject matter is accorded to a particular level of government that characterization permits situations to be viewed as discrete political problems over political claims (that is, battles between political philosophies). This establishes an attitude that the legislative regimes in the area of human rights are solely a matter of a particular province's political inclination, and consequently, subject to those same political caprices.<sup>28</sup> So, in theory, a province more concerned with business property "rights" may properly cut away at other human interests, if it will serve the business orientation better. Alternatively, argument becomes engaged over the legitimacy of taking away "management rights" (a perversion of some concept of individual property "right") rather than protecting the individual rights.<sup>29</sup>

#### A. Consequences of the Socio-Political Perspective

As will be seen, considerable diversity exists among the various human rights legislations. Again, in part, this is because the human rights issues have become political devices. In framing matters as "things" we are going to permit the individual to have, as opposed to rights for which the person is inherently entitled to have protected, we end up with contests between the individual and any other political combatants over the limited political resources. "Rights" then

become more akin to "privileges" or, worse, they become "commodities" to be sold or bargained away. At the same time, as the Senate Proceedings in 1950 recognized, it is rare that one can make infringements of rights the issue of an election: "in fact it is almost impossible to do so, because usually the infringement affects not very many people, perhaps only a few individuals or a single individual...and usually an unpopular individual at that."<sup>30</sup>

In the early stages of the development of the legislations, the issues were not even considered rights matters. Instead, they were framed as an employment problem (in hiring or wrongful dismissal) or a landlord-tenant issue or a real property concern. While the stance gave reassurance that we were capable of handling that particular small issue, it also left the legitimacy of the existing structure basically unquestioned.

If one lives in a province where the legislation is weak, realizing change is particularly difficult. A legislative majority not only can politically ignore the calls or needs of minority groups, it can also reduce the legislated rights of others or legislate against them, which further entrenches the situation of powerlessness. Yet even if one lives in a province where the legislation is comparatively strong it is easy for governments and courts to become complacent. As minority groups move away from the most egregious examples of discrimination and inequity, their pushes for further change oftentimes meet even stronger resistance.<sup>31</sup> By pointing to provinces with weaker

legislation, the retort of the majority becomes "We have done so much for you, why aren't you satisfied?" Lastly, the people lobbying for change fall victim of a "divide and conquer" strategy, having their own limited resources divided between two levels and thirteen fora, exacerbating an already serious problem.

Keeping in mind these problems created by Canada's federal nature, it is useful to examine what has been accomplished in the human rights field by the Canadian governments.

#### IV. History and Provisions of the Human Rights Acts

As earlier mentioned, Canada's first responses to human rights matters were halting at best. This was not necessarily out of any considered malevolence, but largely because "[t]he prevailing attitude among members of the majority groups who recognized [discrimination] as a social evil was that one cannot impose morality by law nor legislate goodness and fair play"(emphasis added).<sup>32</sup>

Parts of the country would respond to particular problems sometimes as they arose or as they reached crisis stature. In doing so they would take a reactive rather than a proactive position. Some of the first efforts were in British Columbia<sup>33</sup> where discrimination in unemployment relief was prohibited and in Ontario<sup>34</sup> where fair accommodation or race relations came up for consideration. Sometimes unfavorable judicial

decisions would create the necessary impetus by stirring public reaction and bringing pressure on the government.<sup>35</sup>

The first detailed statute, however, did not come about in either of these two provinces. Instead, it was Saskatchewan which in 1947 enacted Canada's original human rights- style legislation.<sup>36</sup> This effort contrasted strongly with the earlier acts of other provinces and even with Saskatchewan's own earlier efforts. This new form of legislation dealt with a variety of situations and problems. In addition to covering civil liberties, it prohibited discrimination with respect to accommodation, employment, occupation, land transactions, education, business and enterprises, accomplishing this through the use of penal sanctions.<sup>37</sup>

This method, however, soon was found to have significant drawbacks, most notably the governments' reluctance to enforce the penal provisions.<sup>38</sup> In an attempt to overcome weakness of this quasi- criminal legislation, Saskatchewan and other provinces eventually came to rely on a method that had worked well in the labor context - a process of assessing, investigating and conciliating complaints, then setting up boards of inquiry where conciliation was not possible. Prosecution was used only as a last resort.<sup>39</sup> However, in the early years of the human rights legislation this tack was limited to fair employment and accommodation practices.

Limitations were apparent even with this form of legislation. Because the legislators had not provided enough information to the public about it, people were unlikely to take

advantage of the legislation.<sup>40</sup> Also, the legislatures were still approaching the whole problem of discrimination as if it was only the victim's personal problem and responsibility.<sup>41</sup> Victims carried the full burden of bringing complaints and seeing them through to resolution. Thus, issues still were not considered a "public problem". Additionally, by seeing offenders as discrete individuals (the "one rotten apple" in the otherwise good barrel), systemic problems were neglected.<sup>42</sup>

In 1961 Ontario somewhat alleviated the shortcoming of leaving the full burden on the victim by setting up Canada's first human rights commission. The following year, Ontario's legislature consolidated a number of acts dealing with discrimination in several fields, placing the matters under the purview of the commission (and gave over responsibility of following through on a complaint to the commission).<sup>43</sup> Since then, Ontario's Commissions have had the dual role of vindicating the rights of society and the rights of the individual. At the same time, the establishment of the Commission was expected to mitigate a good portion of the expense that the victim would otherwise face, which, heretofore, had prevented victims from getting justice. Over the next two decades, each of the provinces and territories came to make similar provisions.

#### A. Character of the Legislation

Today, the preambles to provincial acts frequently allude to the "inherent dignity" and "equal and inalienable rights of all

members", purportedly seeing these as instrumental to "freedom, justice and peace in the world".<sup>44</sup> Each piece of legislation conveys concern over both the private interest of the complainant and the public interest of society.<sup>45</sup> To that end, the legislatures express a willingness to circumscribe what might otherwise be absolute liberty. That recognition is established, federally, in section 2 of the Canadian Human Rights Act, which states that in as much as every individual should have an equal opportunity with others to make for herself or himself the life she or he is able and wishes to have, that right must be consistent with the person's accompanying duties and obligations as a member of society. In order to have that equal opportunity, the person must not be hindered by discriminatory practice based on certain proscribed prejudices.<sup>46</sup>

In light of the manifest importance of these concerns, some Canadian jurisdictions have attempted to attach a permanence to their legislations paralleling that of the Charter.<sup>47</sup> Those provinces treat this kind of legislation as having a special character, in that, it cannot be amended except expressly by the legislature, and other pieces of legislation are to be read as to conform with the human rights act.<sup>48</sup>

Most, but not all, provinces also explicitly make the Crown subject to the legislation.<sup>49</sup> Such a minimum requirement is patently clear. As one writer noted, "if the government can exempt its own officers or employees from operation of human



rights legislation, the deletrious effect is too obvious to need elaboration." 50

The country's various legislations, for the most part, are "anti-discriminatory", in that they typically set out some practices or areas of life in which it is prohibited to discriminate on certain grounds, those main areas being the provision of services and facilities, residential accommodation, employment to the public and the display of public notices. In the early court cases, dealing primarily with jurisdiction of human rights commissions, the judiciary expressed a perception that the legislatures were striving to distinguish between parts of life that were totally private (such as opinion or choice of friends) and parts of life that lay outside that sphere. Consequently, in the early judicial views it was assumed there existed total liberty except where something was to be provided to the public. Again, only a strong public connection could warrant interference.

Over the years, there has been a gradual shift away from that public/private dichotomy. In some respects there has also been a realization that food, shelter, services, and employment are all necessities to the person's continued existence 51 and that repudiation of these both denies the value of the person and, in effect, jeopardizes the person's very existence. Today, it is oftimes stressed that, while the right of a person to make private choices is important, that freedom can not be so critical that it could effectively destroy the similar rights of others. As the Canadian Human Rights Annual Report has noted, a person's

right to hold a bigoted opinion does not , in itself, justify the denial of opportunity of others.<sup>52</sup>

### B. Prohibited Distinctions

It should be noted that Canada's movement towards equalized opportunity has been hesitant at best. Even for those activities seen as fundamental to existence, there has been little in the way of efforts to prohibit unreasonable adverse distinctions of all kinds in these areas. Only two provinces have experimented with leaving the list of categories for which discrimination is prohibited open-ended, <sup>53</sup> relying on the phrase "without reasonable distinction." <sup>54</sup> Both provinces later abandoned the efforts. Instead, across the country there are select grounds of prohibited discrimination. Across Canada, although twenty-four different criteria<sup>55</sup> have been selected by one government or another, no one legislative effort covers any more than sixteen of them<sup>56</sup> and some touch upon as few as seven.<sup>57</sup> Indeed, it should be stressed that only four grounds of prohibited discrimination are found uniformly throughout Canada- race, colour, sex,<sup>58</sup> and physical disability.

Other categories frequently enumerated are: religion, ancestry, ethnic origin or nationality. Over the years as particular groups lobbied or as particular issues arose in a region, the grounds have been expanded. So now under some legislative acts there may also be included : mental disability, political belief, sexual orientation, source of income, conviction with a subsequent pardon, family status, or language.<sup>59</sup>

From time to time the commissions have interpreted their own legislation in a manner that has, in effect, expanded the categories so that "sex" may now be seen as covering gender, pregnancy, or sexual harassment.<sup>60</sup> More typically, the grounds are read restrictively though. Indeed, that tendency has recently lead the Canadian Diabetes Association to castigate the Federal human rights legislation as offering less protection than collective agreements provide. <sup>61</sup>

### C. The Difficulties of Diversity

Elsewhere in political haggling we applaud diversity as a provincial responsiveness to regional or idiosyncratic problems.<sup>62</sup> We should question whether that tendency is appropriate to human rights. Particularly for the victim of the discrimination, this type of diversity is not comforting. It seems almost hypocritical that one should be protected from discrimination by marital status in the provision of food, services and accommodation in Saskatchewan but not next door in Alberta, or legislatively shielded in employment from discrimination on the basis of political beliefs in Prince Edward Island, but not across the waters in Nova Scotia.<sup>63</sup>

It is important that we critically question whether there are such a fundamental difference in living and thinking in Lloydminster, Saskatchewan and Cold Lake, Alberta, less than 50 miles away, to justify these differences. Arguably there is not.

These disparities (and others) weaken any idea of human rights (even in the limited sense of anti-discrimination) as being inherent to the person. Arguably, our ideas of non-discrimination are sufficiently well-developed by now that we have passed the threshold where non-discrimination can be legitimately tied to specific categories or specific regions.

## V. The Setup of the Legislation

It may be indicative of the Canadian disposition that most of the decisions which affect a person's legal rights and duties are not made in courts. As one academic noted, "[these decisions] are made in other institutions and only the tiniest fraction of them are either in theory reviewable or in fact reviewed by the courts...Canadians are accustomed to turning, at least initially, to administrative officials and tribunals to enforce their rights." <sup>64</sup>

A moment's reflection affirms this. In addition to our use of ombudsmen, the existence of immigration boards, criminal injuries compensation boards, tax appeal boards, workers compensation boards, municipal assessment boards and unemployment insurance boards all attest to our affinity for dispute settlement outside the courtroom setting, "each of which diverts attention from the court as a way of redress when a right cognizable by the court exists."<sup>65</sup> Our human rights system, thus, is no exception to this particular approach of handling problems.

The reasons for this trend are generally seen as ones of comprehensiveness, efficiency and effectiveness. Additionally, the boards have been perceived as having the ability to be experimental, offering new responses to new situations.<sup>66</sup> In the early days of the commissions, strengths were stressed:

The obvious value of the commission lies in its informality, its flexibility, its speed and its demonstrated ability to secure meaningful relief in the many cases that have come to its attention. It applies the knowledge, the financial resources and much of the initiative, the lack of which would otherwise usually prevent or inhibit a disadvantaged person from seeking redress.<sup>67</sup>

#### A. The Process

The human rights legislation typically operates through a series of procedural layers. It begins when an individual lodges a written complaint with the commission.<sup>68</sup> That complaint is investigated, and when deemed founded, attempts at settlement are made. Sometimes where evidence is tentative or where conditions warrant, the commission may attempt to ameliorate the situation between the parties.<sup>69</sup>

If conciliation cannot be achieved, the Commission may at that point request the Minister to appoint a board of inquiry. Thus, at an early stage any decision for continuation of the matter has been removed from the complainant's control and remains with the Commission, the Board and the Minister, in part because larger societal concerns are simultaneously

involved. At the inquiry stage the board can make such orders as it sees fit and the Act permits<sup>70</sup> and these are legally enforceable.

#### B. Nature of the Boards : Following the Enforcement Model

In part, out of an assumption that the best way to deal with discrimination is through education, and in part out of a recognition that these parties will frequently continue to be in contact with each other after the claim is answered, human rights boards aim at a peaceful and "friendly" settlements as their particular manner of resolution.<sup>71</sup> Again, with a view to irenic responses, prosecution is intended only as a remedy of last resort, for it cannot usually be instituted without the consent of the Minister.<sup>72</sup>

In this regard, the human rights resolution process is perceived to be one that is quite unfamiliar at court, which tends, instead, to see things as bi-polar and largely adversarial, with the plaintiff's and defendant's interests diametrically opposed.<sup>73</sup> In part, this non-confrontational stance may be the result of a 1940's sociology and psychology of prejudice and discrimination - in which "prejudice" was seen as a complex of valuations and beliefs that stood behind discriminatory behaviour. From that perspective, both individual acts of discrimination and segregation patterns implemented by individuals simply reflected local prejudices which could be changed by persuasion and education. <sup>74</sup>

To its proponents, the non-adversarial nature of human rights boards has been seen as conducive to maximizing the dual goals of effective redress for the wrong suffered by the plaintiff and of fostering the implementation of the rights by deterring future infringements.<sup>75</sup> In many respects, this tack seems closely aligned to the American efforts in the civil and human rights areas where they, too, have been trying to distance themselves from the "dispute settlement model", moving more to an "enforcement model" which places emphasis less on finding "fault" and stresses more the redirecting of the defendant's conduct in such a way that it will conform to legal norms.<sup>76</sup>

Most human rights legislations in Canada utilize this enforcement model, firstly by avoiding the castigation of respondent in the sense of finding "fault". As Chief Justice Dickson pointed out in Action Travail there was no indication that the purpose of the federal human rights act was to assign or punish moral blameworthiness. "While some people who discriminate do so out of wilful ignorance or animus" and therefore might be seen as having some intention to discriminate, "there can be no doubt that Canadian human rights legislation is now typically drafted to avoid reference to intention".<sup>77</sup> Similarly, in O'Malley v. Simpsons Sears the court underscored that the main approach of the Ontario legislation was not to punish the discriminator but rather to provide relief for the victims of discrimination.<sup>78</sup>

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Since that time, boards have earned a certain degree of deference, curial and otherwise, by daily demonstrating their competence:

The evidence suggests that the continuous work of an expert body, receiving and investigating complaints, attempting to conciliate and settling grievances, acquiring experience and information... will do more to meet the problem than the occasional prosecution, conducted in public in the ordinary courts in accordance with an adversary system which may have the effect of polarizing the very attitudes which it seeks to soften and change. (emphasis added) 82

Nonetheless, the courts still maintain an appellate position and retain judicial review over jurisdictional matters in most instances. It should be pointed out, however, that these appeal and review roles are quite different in nature and in approach from initially considering the subject.

## VI. The Availability of Remedies

The range of remedies available under the legislations has always been considered to be a significant advantage. The variety and open-endedness of remedies establish an excellent capacity to handle a diversity of situations that might come before the commissions. By way of example, under the Ontario Human Rights Code, the board of inquiry may, by order

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(a) direct the party to do anything that in the opinion of the board, the party ought to do to achieve compliance with this act, both in respect of the complaint and in respect of future practices; (emphasis added) 83 and

(b) direct the party to make restitution, including monetary compensation, loss arising out of the infringement and where infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding \$10,000 , for mental anguish. 84

Some jurisdictions have been active in expanding the means of rectification available to their human rights boards, so that, in some quarters, the remedies (on a theoretical level, at least) can vie closely with anything the court can offer.

The federal human rights act, in particular, has recently been called a "potent new remedy" to fight rights violations.<sup>85</sup> In R v. Druken<sup>86</sup> a law that barred those employed by their spouses from collecting unemployment insurance was declared inoperative under the Canadian Human Rights Act because it discriminated on the basis of marital or family status. In Druken the tribunal ordered Canada Employment and Immigration Commission (CEIC), inter alia, to "cease the discriminatory practice of applying ss. 3(2)(c) , 4 (30 ( d) and reg. 14 A". The remedy was considered quite far-reaching because it effectively rendered those provisions inoperative (similar in effect to a court making a declaration under s. 52 of the Charter ).

The Federal Court of Appeal affirmed the order of the Canadian Human Rights Tribunal. When the Attorney General

challenged the jurisdiction of the tribunal to make a general declaration as to the validity of the legislation, the Court of Appeal maintained that the tribunal's order was "entirely apt" . The Court pointed out that the Act under which the Tribunal functions expressly authorized it to order measures be taken to prevent "the same or similar practice from occurring in the future." <sup>87</sup>

There have been other recent cases pointing out the power of some human rights tribunals. Canadian National Railway gained notoriety for not employing women in what it considered to be "men's jobs". Women were effectively kept out of those positions by the use of certain mechanics tests, which while "neutrally applied" at entry level jobs, effectively prevented women from being considered for the non- traditional positions.

In Action Travail, the Canadian Human Rights tribunal imposed on the railway a "Special Temporary Measure" of a hiring goal of 25% women for all non-traditional openings, until such time as CN was able to achieve a targeted 13 % female involvement in the work force. This was seen as an effort to both prevent future acts of discrimination and to "cure" discriminations. The Supreme Court of Canada upheld the ability of the tribunal to make such an order.<sup>88</sup> In this regard, it would seem that the human rights boards have the ability to engage in the long term supervision that courts are wont to avoid.<sup>89</sup>

When one considers the variety of remedies commissions have provided to complainants over the years, such as getting respondents to write letters of apology or letters of

recommendation, having them post non-discrimination notices, or having the respondent offer reinstatement or invitations to apply for job, and establishing monetary compensations, it is apparent that the boards try to tailor the remedy to the situation that brought about the violation.<sup>90</sup> Moreover, when one encounters remedies such as the establishment of a labor-management human rights committee with human rights courses for all levels of management, as was done at a Calgary plant, it is easy to question whether a court would have been able to employ the same imagination or resolve.<sup>91</sup> Similarly, when one encounters the \$30 million settlement obtained for back wages in a "work of equal value" case, it is hard not to be impressed.<sup>92</sup>

## VII. Trends in Boards

Some commissions have had their role expanded over the years. Under the new Bill C-62, the Canadian Human Rights Commission will be the new enforcement mechanism for an act respecting employment equity and mandated with removing systemic discrimination. Unfortunately, as commissions' roles broaden (but the financial resources do not commensurately increase), commissions often find themselves charged with too many divergent tasks. For that reason some groups are worried that the Commission cannot adequately fulfill the new roles or even the old ones.<sup>93</sup>

Comparatively speaking, the Federal Commission seems to be one of the stronger actors. While the categories of discrimination that the federal legislation covers has not

changed in the last eleven years, the Commission's powers and jurisdiction has been gradually expanded since its inception in 1971. Recently, it has been given "the authority to approve plans that employers voluntarily submit for approval to adapt facilities and operations and the way in which goods and services are provided to meet the needs of people with disabilities." <sup>94</sup> It has also been given the mandate to handle affirmative action programs.

The federal commission's responses have often been the most publicized as well, partly because of the funding it receives <sup>95</sup> and partly because of the number of its cases that make it to appeal court or supreme court level for interpretive resolution. However, as will later be shown, rather than as indicative of any general trend, the federal commission may be considered more an anomaly in the human rights arena.

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 FOOTNOTES CHAPTER 3

1 The first legislative assembly, in 1793, enacted "An act respecting the introduction of slaves and to limit the term of contracts for servitude within this province.", W.S. Tarnopolsky & W.F. Pentney, Discrimination and the Law (5th Cum. Suppl) (Don Mills, Ont: Richard de Boo, 1985) at 25.

2 Such as insurance contracts: See The Insurance Act S.O. 1932 c. 24, s. 4.

3 Such as racial discrimination : See the Racial Discrimination Act, S.O. 1944, c. 51 , s.1.

4 "Political" is meant here in its basic sense of POWER. A good discussion of the matter of power, albeit within the Charter context, is A. C. Hutchinson & A. Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter" (1988) 38 U.T.L.J. 178.

5 Such as the postal service (s. 91 (5) British North America Act), criminal law ( s. 91 (27) B.N.A. Act), railways, communications, trade and commerce.

6 S. 92 (10 ) B.N.A. Act.

7 S. 92 (13) B.N.A. Act and s. 92 (15) BNA Act- the imposition of punishment by fine, penalty or imprisonment for enforcing any provincial law.

8 For the provinces "human rights matters " sometimes fell under matters of a local or private nature". See A.G. Can and Dupond v. Montreal [1978] 2 S.C.R. 770, 792. This characterization has been used to uphold a temporary banning of assemblies in Montreal. Jurisdiction over local trade is undoubtedly provincial. Provincial film censorship and the B.C. Heroin Treatment Act (a public health measure) have both been seen as provincial matters.

For the federal government it was "peace, order and good government and anything not expressly assigned exclusively to the provincial legislatures (see : P. Hogg, Constitutional Law of Canada, Constitutional Law of Canada, 2d ed.(Toronto: Carswell, 1985 ) at 455 and see the postamble of s. 91 B.N.A. ACT).

9 Canada Senate, 1950 Special Committee on Human Rights, at 44.

10 There was, but in a different way. For a discussion of the human rights discourse in BNA Act see Senate Proceedings, 1950, Special Committee on Human Rights, at 17 . At times "human rights" were discussed in terms of humanitarian interests or fairness.

11 For an overview of the divisions with respect to the jurisdictions see F.R.Scott, "Dominion Jurisdiction Over Human Rights and Fundamental Freedoms" (1949) 27 Can. Bar Rev. 497 at 508-9.

12 Indeed, Article 50 of the International Covenant on Civil and Political Rights, to which Canada has acceded, points out "The provisions of the Covenant shall extend to all parts of federal states without any limitation or exceptions." So when Canada stands accused of violating the covenant she can take no refuge in the fact that it a matter within provincial jurisdiction.

See I.Bernier, International Legal Aspects of Federalism (London: Longman Group, 1973) p. 182. Notes that countries can explicitly make reservations to many international documents. Canada did not with regard to the ICCPR. However, Canada did make reservations for the Convention on the Political Rights of Women in 1953.

13 P. Hogg, Constitutional Law of Canada, 2d ed. (Toronto: Carswell, 1985) p. 454- Hogg notes that in Citizens Insurance v. Parsons (1881) 7 App Cas. 96, 110-111 it had been argued that civil rights simply meant rights flowing from law- like status of persons. Court says that it also included contract rights. Also N. Finkelstein, Laskin's Constitutional Law, (Vancouver: Carswell, 1986) 5th ed. Vol. 1, at 414.

14 P. Hogg, *supra* n. 13 at 455.

15 Tarnopolsky, *supra* n. 1 at 39. - He feels the infringement in these areas could be the subject for an action tort or delict, but would not be successful. Yet Johnson v. Sparrow demonstrates exactly that it could happen - \$50 was awarded in damages in 1899 for injury to feeling, for refusal to permit a black plaintiff and lady friend occupy seats in a theatre.

16 Tarnopolsky, *supra* n. 1 at 63.

17 Canada Human Rights Commission, 1985 Annual Report at 19.

18 For example, the Public Services Employment Act or the Civil Aviation Medical Advisory Panel which by setting particular standards in their area of expertise, may have to treat address questions of discrimination on the basis of those standards.

Also see CHRC Decisions, 86-5. Also see Decisions 87-2 ( March 1987) P. 2, CHRC- where a federal government employee's complaint of discrimination on basis sex and family status was seen more appropriately handled by Public Services Commission.

19 See Race Relations and the Law. Report of a symposium held in Vancouver, British Columbia, April 22-24, 1982 at 54.



- 20 Scowby v. Glendenning, [1986] 2 S.C.R. 226, [1986] 32 D.L.R. (4th) 161.
- 21 Saskatchewan Human Rights Code, S.S. 1979, c. S- 24.1.
- 22 W.H. McConnell , "Case Note" (1987) 66 Can Bar Rev. 616 at 618.
- 23 In this regard see Scowby v. Glendenning, supra n. 20.
- 24 Courchene v. Marlborough Hotel [ 1972] 1 W.W.R. 149, 22 D.L.R. (3d) 157.
- 25 Quong-wing v. R (1914) 49 S.C.R.440 (Sask.).
- 26 Walter v. A.G. Alta [1969] S.C.R. 383 (Alta).
- 27 Union Collier Co. v. Bryden [1899] A.C. 580 (P.C.). Other examples include no voting rights for natives because they were wards of the state: Senate Proceedings, 1950, supra n.9 at 41. Chinese, Japanese and Hindus were not allowed to vote in B.C. and not only as a wartime measure. This finally changed around 1948 or 1949.
- 28 Andrew Petter talks about this a bit in " The Charter and Private Action: The impact of Section 15 on Human Rights Codes", (1984) 5 C.H.R.R. c/84-3 and 4.
- 29 A.C. Hutchison and A.Petter, "Private Rights/ Public Wrongs: The Liberal Lie of the Charter" (1988) 38 U.T.L.J. 278 covers this idea well.
- 30 Senate Proceedings, 1950, supra n.9 at 50.
- 31 Minority here need not be a numeric minority but a power minority, e.g. women.
- 32 A. Bruner, " The Genesis of Ontario's Human Rights Legislation"(1979) 37 U.T. Fac. L.Rev. 236 at 239.
- 33 The 1945 B.C. Social Assistance Act said that in the administration of social assistance there could be no discrimination on the based on race, creed, colour or political affiliation.
- 34 1944 Ontario Racial Discrimination Act prohibited the publication or display of signs, symbols expressing racial or religious discrimination. This would only be in regard to in regard to notices and signs. Generally see A. Bruner, supra. n. 32 at 242 .

35 A. Bruner , supra , n.32 at 246, notes that Ontario's response to the case of Re Noble and Wolfe lead to changes to the province's Conveyancing and Law of Property Amendment Act and later to the Fair Accommodation Practices Act. (1954).

36 Saskatchewan Bill of Rights , 1947 , S.S. 1947, c. 35. Also see F.R. Scott, "Dominion Jurisdiction Over Human Rights and Fundamental Freedoms" (1949) 27 Can Bar Rev 497.

37 W.S.Tarnopolsky, supra n. 1 at 27

38 See Ken Norman, " The Charter for the Public Sector and for the Private Actor, Human Rights Codes: A False Dichotomy Leading to the Wrong Result." 5 C.H.R.R. c/84-7 referring to D.A. Schmeiser, " A Human Rights Commission for Saskatchewan " ( 1962) 28 Sask. Bar Rev. 88 at 90.

39 This was recognized as a possibility by the Senate Proceedings in 1950, supra n.9 at 24. New York had been using the conciliation process since around 1942.

40 W.S. Tarnopolsky, in Practice of Freedom (Toronto: Butterworth, 1979) p. 296

41 W.S. Tarnopolsky & W.F.Pentney, supra n.1 at 30.

42 This is a result of the approach to the problem of seeing it as individual prejudice .

43 For an excellent explanation of the political history of the Ontario legislation, see A. Bruner, supra n. 32.

44 Alberta's Individual Rights Protection Act R.S.A., 1980, c. 12.

45 Re Barnes and P.P.F. Loc 46 and M.W. Kellogg Co (N.Y.) Ont. Board of Inquiry, Arthurs Chairman , 29th April , 1968 (unreported).

46 S. 2 of the Canadian Human Rights Act.

47 This is pointed out in: C.N.R. v. Canadian Human Rights Commission [1984] 1 F.C. 96, 85 C.L.L.C. 17, 013, 6 C.H.R.R. d/2906 ( sub nom. C.N.R. v. Action Travail des Femmes), 20 D.L.R. (4th) 668, 61 N.R. 354, leave to appeal granted 64 N.R. , 397. Leave to appeal varied 18th February, 1986; [1987] 1 S.C.R. 114.

48 Tarnopolsky, supra n. 40 at 306.

49 K.Norman, supra n. 38 points out that only B.C.'s legislation does not apply to the Crown.

50 Tarnopolsky, *supra* n. 40 at 306.

51 *Supra*, n. 19 at 42 . The earliest legislation saw this in terms of "fair practices".

52 CHRC, Extra 85-See also *supra* n. 30 at 75.

53 British Columbia ( in 1976) and Manitoba have both employed this approach at one point in time or another. For views on the approach, see Tarnopolsky & Pentney, *supra*, n.1 at 304 and 312. Ian Hunter in Practice of Freedom, *supra* n. 40 at 97, in particular, sees this kind of discretion going to boards as repugnant. Apparently, part of his argument revolves around a perception that "reasonable cause" provisions are akin to retroactive legislation in that business cannot determine in advance exactly what grounds of discrimination are prohibited.

W.W. Black in " Human Rights in British Columbia: Equality Postponed" 1984-5 Cdn. H. R. Yrbk. 219 at 232 counters the argument by stating that " reasonable cause" provision is no more retroactive than the judicial determination of reasonable standard of care in any kind of negligence.

54 In Charter jargon this is sometimes called "unenumerated categories".

55 R. Knopff, "Human Rights Litigation , 1956-1984: A Statistical Profile" 8 C.H.R.R. C/ 87-2 points out that there may be as many as thirty grounds mentioned in the various acts.

56 The two coming in with the highest number of categories are Ontario and Quebec at sixteen each. The Federal government has fourteen , Northwest Territories offers thirteen, Newfoundland and Manitoba each have twelve.

57 Alberta.

58 As opposed to sexual harassment or sexual orientation.

59 See CHRA s. 3(1) and Manitoba s. 9 (2) (i).

60 Janzen v. Platy , [1989] 1 S.C.R. 1252 .

61 See the C.H.R. Adv. , Jan. 1990, at 8, referring to Henderson v. Canadian Pacific Ltd. (Que. S.C. ). The Canadian Diabetes Association considered that people with physical disabilities would have greater benefit of law under Provincial jurisdiction than under the federal legislation. As a result they were considering a s. 15 challenge to the federal act.

62 D. Lockard "The Politics of Anti-discrimination Legislation" (1965/66) 3 Harv. J. on Legis. 3 at 13 notes in the early years the American experience of the rough correlation between the near absence of Negro populations and the non-existence of laws protecting them.

63 It is worrisome that some might employ these arguments try to cut back on the provisions to get "equality"? That would produce formal equality, but certainly not substantive. It would not do justice to the underlying principle either.

Yet this is exactly the position several ministers have taken in respect of the Charter- that the Court is not to "read in" materials, only to read down.

64 B. Wildsmith, "An American Enforcement Model of Civil Process in a Canadian Landscape" (1980-1) 6 Dal. L.J. 71 at 121.

65 Ibid. at 121.

66 P.W. Hogg, "The Jurisdictional Fact Doctrine in the Supreme Court : Bell v. Ontario Human Rights Commission", (1971) 9 Osgoode Hall L.J. 203 at 214

67 J. Hucker and B.C. McDonald "Human Rights in Canada", (1969) McGill L.J. 220 at 227.

68 Which may or may not be the actual victim. S. Day, "Impediments to Achieving Equality" in Equality and Judicial Neutrality, K. Mahoney and S. Martins eds.( Toronto : Carswell, 1987) 402 at 403.

69 CHRC Annual Report notes this too.

70 S.N. Lederman and A. Ristic, "The Relationship Between Federal and Provincial Rights Legislation and Charter Equality Rights" in Righting the Balance: Canada's New Equality Rights Lynne Smith et al ed. (Cdn. Human Rights Reporter Inc, 1986), 83 at 87.

71 Idea of education throughout the complaint process and other means of education as well. One can see that education may be necessary for different parties - education of the victims of the remedies available, education of the perpetrators and of the legislators as to what needs to be changed in the future.

72 For two opposing views of how successful this approach is, see : D. Mullen, "Judicial Deference to Administrative Decision-Making in the Age of the Charter" (1985-6) 59 Sask. L. R. 203 at 206 and

S.Day, "Impediments to Achieving Equality" in Equality and Judicial Neutrality, K. Mahoney and S. Martins eds.(Calgary: Carswell, 1987) at 402.

73 K. Roach, "Section 24 (1) of the Charter : Strategy and Structure" (1987), *Crim Law Quar.* 222, 240.

74 Feagin and Feagin , Discrimination American Style, (Prentice-Hall,) at 2.

75 For a similar type of analysis in the area of the Charter, see M. Pilkington's , "Damages as a Remedy for Infringememnt of the Canadian Charter of Rights and Freedoms" (1984) 62 *Cdn. Bar Rev.* 516.

76 B. Wildsmith, *supra* n. 64.

77 C.N.R. v. Canadian Human Rights Commission [1984] 1 F.C. 96 '85 C.L.L.C. 17, 013, 6 C.H.R.R. D/2906 ( sub nom. C.N.R. v. Action Travail des Femmes), 20 D.L.R. (4th) 668, 61 N.R. 354, leave to appeal granted 64 N.R. , 397 . Leave to appeal varied 18th February , 1986; [1987] 1 S.C.R. 1114 (Chief Justice ) at 1132.

78 CHRC, Extra 86-1,at. 9 Daisley v. Fantasy Cuts ( 1988), 9 C.H.R.R. D/4447 (B.C.H.R. Council). This case is interesting in one respect because the council uses this as explanation for NOT giving extra redress . The Complainant received \$350 for wages.

79 S.Day, *supra* n.72 at 403.

80 *Ibid.* at 403.

81 K. Norman , "Case Comment on St.Paul's Roman Catholic Separate School v. CUPE and Huber, (1988) 67 *Cdn. Bar Rev.* 365.

82 P.W. Hogg, "The Jurisdictional Fact Doctrine in the Supreme Court: *Bell v. Ontario Human Rights Commission*" (1971) 9 *Osgoode Hall L.J.* 203 at 204.

83 Depending on jurisdiction, the interpretation of "anything to achieve compliance " can be as wide or as narrow as the board wishes. In York Condominium Corp. No. 216 v. Dudnik the Board of Inquiry awarded, apparently for the first time, \$25,000 for loss of opportunity to get into the real estate market when a woman with a child was blocked in her purchase of an "adults only" condominium. The court reviewing the decision found that, while the condo bylaws offended the prohibitions against discrimination on the basis of family status, only the award for \$1000 would be upheld. The judge did not see the board's award for loss of opportunity as something to be legitimately considered by the Board of Inquiry. See S. Ellis, "Adults only 'condo illegal, but Ont. mum's award cut", Lawyers Weekly, May 31, 1991, p. 7 .

84 Ontario Human Rights Code , (1981) , c. 53, s. 40 (1)

85 C. Schmitz , "Human Rights Act used to declare law inoperative", Lawyers Weekly, Sept. 30, 1988, p. 1 , commenting on McKinley v. M.N.R. (1987)

86 Ibid.

87 Ibid.

88 Action Travail, supra n.77.

89 On the court's tendency to avoid long term supervision, see generally B. Wildsmith, supra n. 64 ; also F. Coffin, "The Frontier of Remedies: A Call for Exploration"(1979) 67 Calif. L.R. 983 for a discussion of judicial intervention so as to achieve desegregation in schools.

90 See W.S. Tarnopolsky & W.F. Pentney, supra n. 1 at 15:63ff.

91 CHRC Decisions 85-1.

92 Public Service Alliance of Canada (Hospital Service Group) v. Treasury Board as reported in CHRC 1987 Annual Report at 19. This was for performing work of equal value. One question then coming to the surface is whether it will only be those who already wield some power in the first place, such as the unionized, who will get the real help from these kinds of decisions?

93 CHRC, Extra 86-1 , Jan. 1986.

94 This is not a true "remedy" because it is a matter of the employer volunteering. 1986 CHRC Annual Report " Program Activities".

95 1988 figures indicate a \$11 million budget, which is sizeable compared to other provinces.

CHAPTER 4:  
THE VIEW FROM THE OTHER SIDE:  
HOW BOARDS FUNCTION IN REALITY

I. Introduction

Despite many of their apparent strengths, human rights legislations (and the commissions that carry out those goals) are fraught with problems and limitations. These shortcomings fall into three general categories: a) substantive, b) procedural and c) philosophical. While any one of these might weaken the efficacy of the legislation, in combination they seriously undermine our professed intention to protect the citizenry.

II. Substantive Shortcomings

These have already been discussed to some degree in the discussion of categories and grounds of discrimination and in regard to the federal/ provincial dichotomy. I would like to offer The Red Eye case as a further example of the substantive problems in the legislations.

A. The Red Eye

The University of Saskatchewan engineering student newspaper, The Red Eye, used cartoons of women that, at best, could be described as "in exceptionally poor taste". The paper had "explained" in an editorial that the reason the paper could

rightly be accused as treating women as inferior was because, in the editor's estimation, "they were inferior".

Referring to s. 14 (1) of the Saskatchewan Human Rights Code which prohibits the publishing or displaying of any "notice", "sign ", "symbol", "emblem" or " other representation" which ridicules or belittles a person or group of persons on specified prohibited grounds, the Saskatchewan Human Rights Commission determined that the publication violated provincial law. However, the Saskatchewan Court of Appeal in The Saskatchewan Human Rights Commission v. The Engineering Student's Society<sup>1</sup> found that although the student newspaper had published articles, cartoons and photographs that were clearly offensive to women, the paper was not in breach of the provincial human rights legislation.<sup>2</sup>

The Court concluded that, although these particular publications would not be protected under the rubric of free speech, that the articles, cartoons, and photographs would not constitute any of the considered types of "representations" under the Code.<sup>3</sup> "But despite his discontent with the material, Mr. Justice Cameron said the Code's drafters had constructed the legislation too narrowly to be applicable in this case, thus precluding any control over editorial content of newspapers."<sup>4</sup> It was Justice Cameron's position that "the text does not speak to the making of statements, written or oral, having prohibited effects...[t]he provision does not have that kind of sweep. If it had, it would gather in statements in newspapers, magazines, plays, performances, dissertations and the like." <sup>5</sup>



Instead, Justice Cameron saw the nature and purpose of s. 14 as centred on situations like the placing of a sign in a restaurant window or in a union hall that would indicate a discriminative basis upon which an opportunity might be obtained or denied, such "No blacks here" or "Jews need not apply ". It was the judge's consideration that while the "purpose of the Code pulls in one direction, the cast of the section [pulls] in another. "6

Whether or not Justice Cameron's interpretation of the legislation was in accord with the historical realities, and whether it may have been in accord with the legislative intent in the past, for many people his conclusion is particularly disheartening. It must be recognized that the actions of the editor in the Red Eye case were more than just in poor taste and arguably the actions offended more than just some people's mores. Instead, the overall tenor of the paper treated women as means rather than ends, and this article, in particular, denied women as having intrinsic worth. The article constituted a profound affront to the dignity of women. These were attacks on the dignity and self-respect of females as human beings, with slurs that reinforced sexual inequality.<sup>7</sup> Here was a newspaper whose contents could nowhere be construed as any political statement and whose contents certainly were an affront to the dignity of women as people. Yet redress for the situation was not and might never be forthcoming.

Whether or not the honorable Justice's technical interpretation was correct, the decision points out the

inadequacy of provincial statute law to handle this kind of matter.<sup>8</sup> Canadian provinces for a long time now have battled this problem of legislative measures that impact on the media. Provincial legislatures have refrained from drafting a wider section for the Code, presumably because such an action might be seen as controlling free speech,<sup>9</sup> or as an intrusion into the criminal law provisions against hate literature, either presumably running afoul of federal jurisdiction. At the same time, the federal legislature may refrain from acting, firstly, because it purportedly touches upon free speech and secondly, as degrading of women as it is, it does not seem to get to the point where it could be construed as inciting hatred- ridicule, contempt, derision, etc., but not hatred.

For the federal government, the question becomes what limits should be placed on the freedom of speech, but for the provinces the question remains "Is this part of our jurisdiction?" In an attempt to resolve the provincial dilemma, some writers have suggested that if the control is over the message, not the medium, this is not a matter of federal jurisdiction.<sup>10</sup> If the messages indicate discrimination or an intention to discriminate, and the restriction does not harm the essence of free speech, free press or free expression, then the legislative measures will be intra vires the provincial legislature. It is important to note that the constitutional challenge once again redirects the battle from the substance of the complaint to a technical one of jurisdiction. Rather than openly discussing whether the societal goal of equality in dignity and respect is being flouted in the

Red Eye article, and instead of articulating the limits on freedom of speech, the discourse is high centred on a jurisdictional basis.

It is important to recognize that these jurisdictional problems inhibit legislators from acting in the first place, especially where the legislators know there will be a strong chance of constitutional challenge. In pressing for changes to the law, private actors face the same jurisdictional dilemmas.

#### B. Striving for Change within a Federal System:

##### Divide and Conquer

Another substantive shortcoming of the legislation is the ability of individuals and groups to effect change within the two tier system. It is particularly difficult for a provincial interest group to be able to effectively lobby for a change in federal legislation. National groups exist, but they run into the converse problem of having to direct their attentions not only to the federal government, but also to the ten provincial and two territorial governments. Power becomes diluted and reform remains elusive.

#### C. Racism as Case in Point

Racism is one area which has been particularly prone to the caprices of constitutional division of powers. The Canadian Consultative Council on Multiculturalism noted that one of its problems in pursuing complaints arose from difficulties in ascertaining whether questions of racism were federal or

provincial jurisdiction. Its second problem (and to the Council, a more important one) was that certain provincial Human Rights Commissions appear to have broader powers than others.<sup>12</sup> It is in light of this variability that the Council recommended that "the federal government ...take steps to confer with all provinces in order to establish an amalgamation of all Human Rights Commissions into one body, all having the same jurisdiction and powers...".<sup>13</sup> While that change is not likely to be forthcoming, the suggestion leads one to consider if there might be another way of transcending the jurisdictional debates in order to effectively protect the rights of all people. The common law may be one possibility, because one of its strengths is the fact that it transcends borders.

#### D. In Comparison with our International Obligations.

The problems of substance are compounded further by the fact that the various legislations permit defences and exceptions under the legislation that have no express equivalents to our international obligations. Canada commonly utilizes defences such as "bona fide occupational requirement" and permits the restriction to services or facilities to "persons of the same sex on the ground of public decency". Many of the legislations also permit exclusion of whole groups, such as domestics and farm employees, plus others if the Lieutenant Governor in Council gives permission.<sup>14</sup>

Definitions of what is prohibited are restrictive as well. For example, "age" in some provinces means over eighteen years, while in other jurisdictions it is defined as between the ages of forty-five and sixty-five.<sup>15</sup> In contrast to the aims of non-discrimination this ad hoc approach undermines the concepts of intrinsic worth, with parties having to fit themselves in to be afforded protection that should be theirs by right.

By way of comparison, the approach at international law is far more integrated, partly because discrimination is defined. At international law "discrimination occurs when in a given case no sufficient connection exists between the equality or inequality aspects on the one hand and the nature of the treatment on the other." Sufficient connections exist only where the classification is relevant to the subject, fairly related to it, not capricious or arbitrary, but instead reasonable and just.<sup>16</sup> The distinction must be "real and substantial", and that classification must be relevant to the objects.<sup>17</sup>

It has been established at international law that discrimination occurs and the principle of equality of treatment is violated, if the distinction has no objective or reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to principles which normally prevail in democratic societies. The justification must do more than simply pursue a legitimate aim. The article is also violated when it is not clearly established that there is a reasonable

relationship of proportionality between the means employed and the aim to be realized.<sup>18</sup>

Undoubtedly, many of the limitations, definitions, and restrictions Canadian legislation employs would be acceptable under international law for "securing the recognition and respect of rights and freedoms of others" or "for meeting the just requirements of morality, public order and general welfare in a democratic society".<sup>19</sup> Some might not .

Consider the Canadian legislative approach for "bona fide occupational requirement."<sup>20</sup> Ideas such as "bona fide" leave open the possibility that a mere "rational" explanation for the requirement will suffice, and possibly falling well short of any type of proportionality between the goal and the means used. Moreover, the term "bona fide" tends to preserve the status quo. Even the term "good faith" with which bona fide is usually twinned leaves room for unintentional or non-malicious acts whose effects still discriminate.<sup>21</sup> It is those kinds of interpretations that many hoped that human rights protections would rectify, not re-inforce.<sup>22</sup>

#### E. Substantive Limitations as Evidenced by Variability in Remedies

As previously mentioned, across Canada there is considerable variability in legislation in what is permitted or prohibited. Some provincial legislations carry the label "Human Rights Code" and are apt to be viewed as comprehensive schemes, replete with all remedies that might possibly be

available to the complainants.<sup>23</sup> Nonetheless, one of the strongest criticisms lodged against human rights legislations is the matter of awards in human rights cases. Victims frequently do not seem to be adequately compensated.

Again, this results from the variability of remedies. At the "generous" end of the money spectrum is Ontario's legislation which makes allowance for compensation to the complainant to cover pecuniary losses resulting from the discrimination (but to a limit of \$2000), and allows up to \$10,000 for mental anguish where the actions of the respondent have been wilful or reckless.<sup>24</sup> At the same time the respondent can be subject to fines up to \$25,000.<sup>25</sup> Manitoba's 1987 statute sets no explicit limit on exemplary payments, though it may be too early to determine exactly what range the commission will set for itself.<sup>26</sup> There is the possibility that the limits on the neighbouring provinces will influence Manitoba's own standards. What should be noted is that in Manitoba one court (it is submitted completely erroneously) tried to establish a correspondence between the quasi-criminal penalties and the civil award.<sup>27</sup> In that the fines are low or not used, this effort would further erode the compensatory aspect.

At the other end of the spectrum, Alberta's Individual Rights Protection Act<sup>28</sup> may be the most technically narrow remedy provision, as it neither specifically mention fines or non-pecuniary losses. While this might seem to be inherent in the Commission's broader power, at least one case has stated otherwise.<sup>29</sup>

At least one human rights board has specifically commented that the primary purpose for awards is not to give full compensation by way of damages in a civil suit, but rather to discourage would-be violators of human rights legislation and to provide a measure of recompense that is more than token, compensating the complainant, at least in part, for monetary loss and for the pain and suffering and loss of dignity inflicted upon her or him.<sup>30</sup> Arguably anything less than full compensation is only a token gesture.

### 1. Monetary caps

The general response of Parliament and the legislatures to date has been to establish a monetary cap, especially in respect of "special compensation". The major problem with dealing with a monetary cap in the area of compensation of humiliation, loss of dignity, loss of self-respect or self-esteem is that this sets up a psychological range in which the human rights commissions place the cases along a continuum. At the low end will be what are perceived as the less hurtful cases or, perhaps more likely, just the more commonplace. At the other end will be placed the less frequent or more novel cases.<sup>31</sup>

Some recent cases from British Columbia might serve as example. Members of minority groups often state that discrimination at work is commonplace and minority groups are often fired summarily. In one typical case, a complainant was eventually awarded \$350 for the humiliation suffered in



being abruptly dismissed from work. That amount, by any standard, is a pittance.

Two sexual harassment cases involving male employers and female employees (presently a very topical subject matter) each netted \$1250. By way of comparison, a sexual harassment case involving a male employer propositioning of male employee (the incident which the complainant only considered as a "blow to his ego") generated the maximum of \$2000, with no award given for lost wages.<sup>32</sup> Another less orthodox case involved a white woman's complaint against a black taxi driver accused of issuing "threats" against whites in general.<sup>33</sup> The woman was awarded \$1000. The novelty of the situation undoubtedly influenced the amount of the award.

What must be underscored is that novelty has nothing to do with the impact of the violation on the victim, with how the person feels. While novelty may catch the commission's attention, it also skews the responses. That which is commonplace may be all the more reprehensible, objectively, precisely because of its frequency.

While it is arguable whether there can be such a thing as an "objective" sum to deal with these matters, what one can suggest with a fair amount of assurance is that the upper limits of \$2000 or \$5000 may not be enough to tackle the most egregious cases. At the same time, caps hurt the whole spectrum of cases by putting downward pressure on them. Once again, although in the establishment of damages in these cases commissions are not bound by precedent, commissions cannot

help but be aware of what they and their colleagues have given in other cases, if only to promote consistency.<sup>34</sup> These stand as a measure by which the case at hand is seen as better or worse in circumstances of the violation.

In part, these caps are in place because it is sometimes felt that emotional or psychological reactions are easily overstated and difficult to disprove. Simultaneously, there is a concern that by not setting limits one may be giving in too much to the individuals with the weakest character - what might be considered "the thin-egoed woman", as juxtaposed to the tortious or criminal concepts of "thin-skulled man". There also exists a feeling that dignity and self-respect are principally internal characteristics and that the person's image of self is to a great extent divorced from what people say of her or him.

Again, this illustrates our ambivalence in the area. It may be the fact that we are dealing with women, natives, immigrants or any group victimized by discrimination that makes us somehow trust their reactions less.<sup>35</sup> Also, because self-respect is an on-going concept, it may also be that some see this as making this respondent pay not only for this incident but also for the degrading actions of others. Lastly, and exceptionally important, because the governments are also subject to the Acts, it certainly is not in any government's best interest to be heavily hit by damages.

The monetary limits sufficient for dealing with some instances where a private actor, in an isolated incident, has

suffered harm through the discrimination of another, may be totally inadequate where the harm is suffered through corporate action, the harm has involved numerous victims or the harm has operated an extended period of time. In each of these, there may be considerably more serious damage, warranting larger sums than the boards may be able to offer. This is particularly the case where the discrimination is systemic. Some provinces' legislations do make a private /corporate distinction, but generally it is in regard to fines, not to damages. It may be for this reason that the federal Human Rights Commission recommended to Parliament in 1987 that the monetary cap be removed and the Tribunal be given discretion in awarding damages.<sup>36</sup> That recommendation has been ignored to date. It has also been argued before the Canadian Human Rights Tribunal that the federal cap is discriminatory. So far the argument has been rejected.<sup>37</sup>

## 2.The Level of Awards Given: The Need to go Beyond Tokenism

Even more serious is not what can be awarded, but what is awarded. While awards in the areas of dignity, self-respect, humiliation, and hurt feelings have increased since the 1970s, they basically seem to have barely met the rate of inflation. Dismissal on the basis of age will generally gross about \$350 (and \$125, or even \$50, being more common to the Maritimes<sup>38</sup>), but sexual harassment will often come in at the \$500 to \$1250 range. At law and in business, awards at this

level are considered "nuisance awards", trivial amounts given simply to get the person off one's back. More unsettling, what these particular cases do not highlight is the number of cases where no award is made at all. Again, variation among the regions in Canada is strongly evident, with Maritime provinces typically offering the lowest awards.<sup>39</sup>

The low levels of awards are seen to perpetuate the problem by trivializing the matter. It is argued that awards given so far in human rights cases are not a deterrent to the offender and may leave the impression that rights violations can be bought. "They certainly do not convince anyone that discrimination is important; on the contrary they demonstrate its insignificance."<sup>40</sup> In pointing to the United States where awards have been much more substantial by similar institutions, researchers have concluded that the level of compensation and back pay can be the single most important factor in changing employment practices.<sup>41</sup>

Awards under the federal legislation seem impressive (sometimes in the \$25,000 to \$85,000 range) but they typically are only for loss of wages that have accrued to the time of decision. Even then, there is the additional problem of collecting what is owed to the victim, because some parts of the federal Government do not perceive these financial settlements as legal obligations under the Financial Administration Act. As the 1987 Annual Report of the Canadian Human Rights Commission notes, in those cases approval of a Minister is required before the departments would honour the settlements.<sup>42</sup> The second

problem the federal Commission has encountered is that there is no statutory method for enforcing settlements because prosecution under paragraph 46 (1) (a) results in fine rather than a civil remedy.<sup>43</sup>

### 3. Why not Full Compensation?

The question remains " Why not give full tort or contractual compensation?" Arguably, the answer is because it is politically expedient not to do so. Less cynically, the answer may also lie in the problem of evidentiary proof. Many of these cases deal with circumstances that are difficult to substantiate, and commissions give the complainant leeway (allowing various hearsay evidences that a court might discard) in order to establish a violation. In doing so, there must be something in the respondent's favor to offset that flexibility and lower compensation may be the counterweight. What this does, however, is to mix factual finding of violation (or not) with the issue of compensation. The lower compensation becomes unfair to both parties, to the complainant who is receiving less than full measure and to the respondent who is paying for a "violation" that he did not commit.

The disadvantages of this situation for the complainant is compounded by the fact, even when the violation has been founded and damages have been proven, that in some jurisdictions the Board is given power to give a remedy but is under no compulsion to do so. At least in one case the Board has

refused to do so and the court has refused to force the Board to reverse that decision. <sup>44</sup>

F. Substantive limits from the Point of "Equal Benefit of the Law" and of "Equal Protection of the Law".

Some academics have tackled these substantive limits from a standpoint of equal benefit of the law, opening up the possibility of Charter challenge to the variability in the human rights legislations. Rather than seeing the codes as bestowing benefit on certain discrete forms of discrimination, it has been suggested that alternatively "the benefit of human rights codes can be characterized more broadly as the elimination of discrimination per se...". The failure of a legislature to address one of the Charter grounds of prohibited discrimination might be viewed as denial of equal benefit of the law, "because that benefit- elimination of discrimination per se - would be denied in a unique way..." to this particular group.<sup>45</sup> It is a position that has support at international law. <sup>46</sup>

We know that equality before the law will be infringed if an individual has been treated more harshly than others by the legislation on the basis of an irrelevant distinction made between himself and those other persons.<sup>47</sup> Place of residence (that is, the particular province in which one lives) would seem to be totally irrelevant to the remedy given in respect of human rights legislation.

Conceivably, argument can also be made that the restricted approach Canada's provinces and federal government have taken

similarly offends Canada's international obligation to give equal protection of the law. The differences amongst provinces in their provision of remedies would seem to be a prima facie violation equal protection of the law.

# 1. R. v. Turpin and "Equal Protection of the Law"

The Supreme Court of Canada in R v. Turpin<sup>48</sup> considered the meaning of "equality before the law" under s. 15 (1) of the Charter. In Turpin, the defendants objected to provisions of the Criminal Code which mandated that in all provinces except Alberta there must be trial by jury for murder cases. The defendants perceived this requirement as a breach of equal protection of the law, because they wanted trial by judge alone, but could not get it in their province.<sup>49</sup>

In Turpin the Supreme Court first explained that "the guarantee of equality before the law was designed to advance the value that all persons be subject to equal demands and burdens of the law and not suffer any greater disability in the substance and application of the law".<sup>50</sup> This was tied to "rule of law" that the law be impartially applied and administered.<sup>51</sup>

In Turpin, the S.C.C. found that the defendants had been denied an opportunity available to others, and, thus, that their right to equality before the law had been violated. However, this was only the first part of a two-step test, and more was needed to be shown, as the Charter permitted differential treatment as long as it is "without discrimination". For an

understanding of that term the Court relied on Andrews v. Law Society of B.C.<sup>52</sup> where the court offered a definition of discrimination as

distinction... based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or withholds or limits access to opportunities, benefits and advantages available to other members of society. <sup>53</sup>

In Turpin, the judge stated "[a] finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged." <sup>54</sup> In determining whether this has been the case entails usually a search for a "discrete and insular minority". <sup>55</sup> To the Supreme Court the whole idea behind s. 15 is remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society. It involved a search for indicia of discrimination such as stereotyping, historical disadvantage or vulnerability to political and social prejudice.

Putting aside for the moment the proposition that the Supreme Court's position will require a body under examination to already have a certain degree of politicalization - an ability to organize and present itself as a "legitimate" group- that may deny protection to the least politically organized ( but possibly the most victimized by discrimination), application of Turpin to the civil area needs be considered.<sup>56</sup>



## 2. Application of R. v. Turpin

It is apparent that a case involving human rights legislation in respect of equality before the law and equal protection of the law could come before the courts in at least two ways :

(a) a defendant / respondent might complain that he was subject of discrimination because the legislation punished him but not the same violator next door. This approach to equality before the law was accept in the context of the Canadian Bill of Rights in Drybones.

b) a plaintiff/ complainant might point out that a similarly situated group (e.g. in a neighbouring province) was protected by the legislation, but that the legislation of his own province had not protected him by not offering him remedy, consequently it disadvantaged him.

The respondent might be disadvantaged in that he is subject to penalties or legal repercussions that others are not, but he would have difficulty meeting the insular group criteria of Turpin - or meeting the qualification that as a member of a group he had faced stereotyping, historical disadvantage or vulnerability to political and social prejudice.

In the scenario involving the complainant, the person is subject to a legal disadvantage similar to Turpin. Depending on the particulars, some complainants could probably meet the second criterion as well, for example if the discrimination was on the basis of sexual orientation or on economic condition. Both of these illustrated groups have been subject to unproven

and unjustifiable assumptions and stereotyping, to social, political and legal disadvantage in our society.

Even with the complainant having seemingly met the criteria of Turpin, the question then becomes whether there is any opportunity of employing a Charter argument outside the public law area. The Supreme Court in Dolphin Delivery v. R.W.D.S.U. <sup>57</sup> basically stated that although the Charter did apply to the common law within certain narrow confines, the Charter did not concern itself with the bulk of the common law, such as tort law. Thus it might seem that a tort based solely on the Charter and without connection to either legislative enactment or administrative regulation would fail.

Another approach suggests this need not necessarily be the case: Any legislation, including human rights acts, can be challenged under the Charter. Where infringement of the Charter not justifiable under s.1 has been found, the Court, under s. 24 (1), can offer whatever remedy it deems "appropriate and just" under the circumstances. Although the Court has generally been unwilling to "read in" provisions into legislations, we do know that "an appropriate and just remedy" can include damages. Arguably, an adequate and justifiable remedy could also include the possibility of tort action where a particular province's legislation failed to address a form of discrimination recognized elsewhere in Canada. This point will be discussed in more detail in Chapter 7. For the moment other deficiencies of human rights legislations need to be considered.

### III. Procedural Shortcomings :

The limitations here fall into several different areas including, inter alia, diversity in the inquiry systems, extent of judicial review or appeal, time limits for lodging the complaint and who the complainant can be.

#### A. Physical Structure

The inter-provincial human rights inquiry system is so divergent that it has been called a "crazy quilt".<sup>58</sup> British Columbia has a two tier system where the complainant may have an allegation tested before a designated member of the Council of Human Rights. In Alberta, the human rights commission controls whether a board of inquiry is constituted. In Quebec, the Commission avoids the inquiry stage, simply by carrying the cases before the court.<sup>59</sup>

#### B. Board Jurisdiction

The diversity carries over to other areas as well. Nova Scotia gives its human rights board jurisdiction over any question of fact or law, while Saskatchewan simply mentions questions of law. Under Ontario legislation, if the Commission feels that the matter is better dealt with by another Act,<sup>60</sup> they can decide not to deal with the complaint, but have no power to cause that other body to deal with it, potentially leaving the complainant without remedy.

The issue of jurisdiction comes to the fore in other ways as well. When Newfoundland changed its human rights legislation in 1988. Unlike other provinces, no reference was made to the legislation having paramountcy over other provincial legislation. Although the Newfoundland Code prohibits discrimination on the basis of age, defining age as 19 to 65, the question arose whether the Pension Act was discriminatory by requiring retirement before age 65. The Newfoundland Supreme Court recently ruled that their Human Rights Code could not be interpreted in such a way as to alter the provisions of the Pension Act.<sup>61</sup>

### C. Appeals and Judicial Review

Even with respect to appeal there is no uniformity interprovincially.<sup>62</sup> A question of law founds an appeal in Saskatchewan<sup>63</sup> while in Ontario appeal is capable of encompassing any question of fact or law ( or both). By way of contrast, mixtures of law and fact are not appealable in Alberta.<sup>64</sup> As well, in Alberta one can only appeal if one is a party to the proceedings of the board of inquiry. Should the complaint never get that far, the person is left totally without redress. There may be judicial review, but the error must be particularly egregious before the courts will step in. Moreover, provision for judicial review would merely give the question back to the board who may decide the matter the same way once again.<sup>65</sup> It must always be remembered that there are

fundamental differences between hearing a case at first instance and hearing it on either appeal or judicial review.

#### D. Time Limits

Time limitations operate against complainants. According to federal statistics ten per cent of complaints before the federal commission are dismissed as out of time.<sup>66</sup> In Ontario the complaint must be recorded within six months, but allowances are made for good faith delay as long as it does not prejudice "any person affected by the delay".<sup>67</sup> For other provinces it is generally six months, with no margin of error. Compared to the usual two year and six year limitation period of tort law, this seems exceptionally brief.

This brevity for bringing complaints may be tied to problems of proof or, alternatively, to behaviour modification through education and information. According to psychological schema it is desirable to have "education" follow as closely to the event as possible in order to effectively alter the behaviour.

Yet one is left wondering what other intentions and goals might be operating. Firstly, if "education" is to be closely tied to the violation, then long time delays in achieving settlement, which are presently quite common, would seem to thwart that goal. As well, some provinces set time constraints on the wage compensation paid out to one year before the complainant, reducing the possible costs to the respondent.<sup>68</sup> Arguably, the intention here may be the shielding of the respondent to the detriment of the complainant.

### E. Complaint-based System

The provincial legislation has been perceived as being subject to a variety of problems in servicing human rights as well. Because the program is not an active, transformational mechanism but a complaints-based one, many feel that this is a dispute resolution system which best serves individuals and not the larger problem of systemic discrimination. Although the acts typically state that "any person" who has reasonable grounds to believe that there has been contravention of the Act may make complaint and define "person" as including groups such as trade unions, or employers associations, the acts, nonetheless, are primarily designed to deal with one-on-one situations. This orientation works against what human rights commissions generally agree is the most significant equality problem, that of systemic discrimination which disadvantages whole groups of people.<sup>69</sup> In particular, "[t]hey cannot readily identify or investigate systemic complaints in a sophisticated manner or present them before tribunals and courts."<sup>70</sup> At the same time Commissions have not altered their own systems significantly so that they can address systemic discrimination effectively.<sup>71</sup>

An excellent example of this recently came to fore in Saskatchewan (Human Rights Comm.) v. Saskatchewan (Dept. of Social Services)<sup>72</sup> where the human rights board in dealing with the discrepancy between the amounts of social assistance assessed damages for the the claimant. The decision potentially

would have affected a significant number of other people on social assistance in the province. However, the Board found it had no jurisdiction to order respondent to repay others in circumstances similar to original complainant, as the Board only had jurisdiction to compensate complainants before the Board. What the Board did, instead, was order respondents to notify all other potential complainants that they might have grounds for complaint. Not only is this a backward approach to the problem, this response is uncomfortably close to the early approaches in which victims carried a substantial part of the responsibility for enforcement of the Act.<sup>73</sup>

The question that remains of course, is: "Would any forum fare better?" Courts, themselves, of course cannot investigate systemic discrimination, but in a court action sufficient interest and resources may be at risk to make all parties present as much factual evidence as possible in order to make or defend their case. Whether the courts could be more transformational depends in part on the particular remedy chosen - with injunctions potentially offering strong long term respite.

As will be argued later,<sup>74</sup> damages offers another transformational role by making the cost of the present policy economically more unattractive. This, of course, depends on curial willingness to employ the particular remedy. It also depends on the nature of the party- whether individual or class action.

### F. Class Actions

Class actions are permitted in B.C.<sup>75</sup> and in some other provinces in respect of lodging complaints. The provision is lopsided, though, in that actions against multiple respondents (inverse class actions) are not allowed and boards may lack jurisdiction to award damages to a class of persons.<sup>76</sup> Consequently, in Saskatchewan the Board has recommended to Minister of Justice that the matter of class actions under the Code be reviewed, particularly with respect to remedies available. These constraints on class actions reinforce perceptions that these are only one-to-one types of problems.

### G. Costs

There is also the issue of costs. As costs are not specifically provided for in the Acts, boards have declined to give costs.<sup>77</sup> In the eyes of respondents, the complainants are given an unfair advantage.<sup>78</sup> While the Commission carries the complainants expenses in obtaining evidence, respondents bear the costs themselves. Where this goes to a Tribunal or to appeal, these costs can be substantial.

To "help to equalize the matter", British Columbia has taken another tack. The legislation in that province makes the complainant and the respondent only parties to the Inquiry, with no provision for Commission to give assistance to the complainant. While at first blush this seems to offer formal "equality" in that it treats people identically, it fails to recognize that typically there is an unequal distribution of power and



wealth between complainants and respondents. As a result, it offends justice by treating unequals, "equally".

In respect of its own legislation the federal Commission has recommended to Parliament that Tribunals be given discretion to award prescribed costs to either respondents or to complainants where the Commission has not carried their cases.<sup>79</sup>

#### H. The Internal Functioning : Rhetoric Versus Reality

Any of the procedural drawbacks enumerated above would be sufficient to cause consternation to those concerned with the effective protection of equality rights, but those can be seen as secondary to many other deficiencies boards face. Firstly, one thing becomes readily apparent in assessing the effectiveness of the commissions - there is significant difference between the rhetoric surrounding the legislation and the reality. Although Canadian human rights legislation allows commissions to initiate complaints and gives them a positive duty to ensure compliance with the law, commissions in the main have not used the power.<sup>80</sup>

Also the "quick fix", that we assume is an advantage of the commissions, does not operate in fact. It is common for complaints to take three to four years from filing to resolution.<sup>81</sup> Concerns are expressed about cases heard in 1985 dealing with events in 1982. Indeed, well-founded cases have been dismissed because of the delays.<sup>82</sup>

Critics stress that "[t]here is no compelling reason why human rights proceedings should be so dilatory. For complainants, a remedy so long delayed may be meaningless; for respondents, an interminably festering accusation is intolerable".<sup>83</sup> Certainly, for the immediate parties it is important that the distance between the event and the disposition be as close as possible.<sup>84</sup> Whether it may be less important for societal objectives remains arguable. Nonetheless, some jurisdictions are attempting to streamline their procedures, but lack of resources can often impede this.<sup>85</sup> It would seem that the problem of speedy resolution is not unique to the courts.

### 1. Limiting Effectiveness

By far the most significant deficiency in respect of internal functioning has to do with independence. International instruments constantly stress that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights..."<sup>86</sup> and that for the alleged violators there must also be protections: "everyone shall be entitled to a fair and public hearing of a competent, independent and impartial tribunal established by law" (emphasis added).<sup>87</sup> Unfortunately, it is questionable whether Canada meets these measures.

From the perspective of complainants, governments have done numerous things that limit the actual effectiveness of human rights law enforcement and the usefulness of human

rights boards in remedying rights violations. Firstly, despite the popular assertion that human rights are among our fundamental values, the governments spend little money in this area.<sup>88</sup> Level of expenditure is relevant as the resources of boards are highly correlated to the board's effectiveness in providing remedies, if only to the extent that the boards can investigate complaints .

## 2. Limiting Independence

Secondly, but very importantly, governments have compromised the independence of the human rights commissions. In contrast with with the Canadian Charter, the statutes under which the boards are enacted are easily amended or repealed. This leaves human rights protections vulnerable. A prime demonstration of this occurred in the 1984 repeal of the British Columbia Human Rights Code.<sup>89</sup> Not only did the Bennett government fire its entire human rights staff, replacing it with a "council of human rights" who operated only on a part-time basis, but the government also drastically altered the range of those protected by the legislation. At the same time, the changes removed both appeal procedures and penal proceedings.<sup>90</sup>

Since that time, the Council has been criticized for having an abysmal track record of discounting what others would consider well-founded complaints, denying natural justice and for refusing, on occasion, to hear relevant evidence.<sup>91</sup> The British Columbia action has been seen by some as a "conscious decision that a low priority be assigned to human rights, based

on either some perceived political advantage or because of a philosophical belief that the right of business to be free from government regulation outweighs the interests served by strong human rights legislation".<sup>92</sup> Legislation that can be altered so capriciously offends the concept of these rights being fundamental or inherent.

Also, appointments to human right boards are frequently politically based. It is a political fact that as governments change, so does the composition of the commissions. Not only does this put human rights in the same category of all other political machinations and patronage, but also critics suggest that "when governments wipe away and recreate human rights commissions and tribunals as part of a political patronage system they indicate that human rights are not stable, fundamental values but partisan political programs."<sup>93</sup>

Moreover, commissioners are made to know that they are not independent, but are expected to "behave".<sup>94</sup> There have been instances of government interference with human rights administration directly by refusing to send complaints to adjudication, stopping press statements, asking to have staff members of a different political stripe removed, firing a whole commission and staff and introducing a new "slimmer" human rights act in the name of fiscal restraint.<sup>95</sup> Impartiality most certainly can be called into question into such circumstances.

The result has been the development of boards who, while probably sincerely caring about their mandate, respond conservatively, interpreting their jurisdictions narrowly so as to

avoid the expenditure of scarce financial resources in litigation over jurisdictional matters.

### 3. Other Concerns : Tenure and Accountability

There are other significant causes for concern - those being the commissioners' lack of tenure and their accountability. "Only Quebec and federal commissioners enjoy the security of knowing that nothing short of an act of legislature will remove them from office." <sup>96</sup> Saskatchewan is considered the next most secure with a fixed term of five years. Yet legislative amendment can always usurp that security. All other jurisdictions provide either no set term or a maximum term of office. In either case, commissioners continue in office at the pleasure of the Cabinet and, again, tend to be removed from office when a new administration is elected.<sup>97</sup> Certainly, it can be suggested that the ability to effect change is related to the term of office. In comparison, judges are in a more comfortable position, knowing that even if they make unpopular, but still "fundamentally right" decisions, they will not be ejected. Even if the legislature disagrees with the court it can always step in and re-open the debate.

At the same time, this high turnover of human rights commissioners after an election is viewed as further removing accountability and continuity from the process.<sup>98</sup> "As far as the important question of accountability only the Quebec Commission has a direct relationship with the elected assembly. All other commissions report to a minister."<sup>99</sup> Overall, there is a

strong feeling that where appointments are politically motivated the system cannot be operating with impartiality for either party to a complaint. For the sake of justice, impartiality is always of concern, but where the government is selecting who is going to be judging its action, partiality becomes a matter of even greater import.

The political connection also has significant repercussions in terms of "fettering of discretion". One of the elementary principles of administrative law stresses that any "authority exercising discretion must exercise itself and not under the dictation of any other body. Discretion calls for an exercise of independent judgment."<sup>100</sup> A basic prohibition in administrative law underscores that "discretion" should not be exercised in such a way that it becomes "dictation".<sup>101</sup> If governments appoint and dismiss commission members at pleasure, any discretion in decision-making may fall by the wayside, and dictation may become the rule.

It is these kinds of concerns that have led academics to warn that the failure to provide satisfactory remedies for the violation of rights may "effectively nullify the rights. Or worse: transforming them to empty propaganda, precisely recited but hypocritically ignored in practice."<sup>102</sup>

### I. Problems from the Perspective of Respondents

When we consider what protections to offer respondents, it is important to remember that it is exceptionally easy to react as if the respondent is guilty of the allegation solely by virtue

of an allegation having been made. One must be careful that in the quest for right's protections of victims the fundamental social goal of justice does not get lost in the fray.

Several concerns have been expressed from the perspective of the respondents. Previously mentioned, the respondents often find the time it takes to have complaints resolved leaves a sword of Damocles over their heads.<sup>103</sup> Also, some critics suggest that there is a presumption of guilt in the investigations or at least a sympathy for complainants and that respondents may be "forced" into "friendly settlements " by investigators using threats or the prospect of the respondent facing boards of inquiry, even where there actually has not been a technical violation.<sup>104</sup>

Some feel that the boards have made orders of questionable legality - such as coerced apologies, deleting sentences from a letter, forcing consent so that the commission might monitor future hiring practices, compulsory initiation of affirmative action programs, confiscation and destruction of private property.<sup>105</sup>

Also, despite the educative and "friendly settlement" philosophy deemed to be underlying the various acts, it is nevertheless important at the same time to realize that respondents will typically consider contact with the Commission as adversarial, even in the commission's early role of investigating a complaint.<sup>106</sup> Once matters get to the board of inquiry stage, the board definitely appears to be functioning in a similar manner to a court.<sup>107</sup> The respondent sees many of

the principles of the court being used against him, but without the safeguards that the court can offer.<sup>108</sup>

Critics find other provisions disconcerting as well. One is the harassment section of the Ontario legislation, which states that the board shall remain seized of a matter, and upon proof of repetition of harassment, the commission can order any further steps to prevent a further occurrence. Consequently, the matter is not subject to the six months limitation period imposed on filing complaints. Detractors see this as forcing the person to "forever live with the prospect that the original tribunal which tried and found him guilty will be 'reconvened' and additional 'sanctions or steps' meted out." <sup>109</sup>

Pointing out the similarities between courts and tribunals in that both can subpoena and compel witnesses to give evidence, <sup>110</sup> critics have suggested that these provisions might be subject to Charter challenges under s. 11(d) right to be presumed innocent and (h) res judicata.<sup>111</sup> Consequently, they would like to have respondents have full protection of the Charter s. 11 in respect to these accusations. That particular conclusion is questionable because these violations are not typically interpreted as "offences" in order to come under the umbrella of s. 11 of the Charter in the first place.<sup>112</sup>

Some writers worry about whether investigative sections of the Code would be able to stand up to the Charter's requirements in Hunter v. Southam.<sup>113</sup> It has also been questioned whether the "reverse onus" requirement of the



"reasonable and bona fide requirement" for the denial of a position would be constitutionally valid.<sup>114</sup>

Concerns as well have been expressed regarding the penal provisions. For the most part the commission rely on a civil standard of preponderance of evidence to ascertain if there has been a violation.<sup>115</sup> There is worry, however, about that where the action is also subject to prosecution and whether the standard should be raised to beyond a reasonable doubt. It has been argued that it could be possible that a commission could find on the balance of probabilities that an offence had been committed, yet a criminal court might not be satisfied beyond a reasonable doubt. Some have suggested this lack of uniformity could bring discredit to the human rights administration.<sup>116</sup> It may be for this reason that the Federal Act does not carry penal provisions for the act of discrimination itself.<sup>117</sup> Instead, the federal and some other provincial human rights acts carry penal provisions for something quite different - the interference with administration and enforcement of the human rights legislation. <sup>118</sup>

#### IV. Philosophical Shortcomings

As becomes readily apparent, the Commissions sometimes encounter conflicts of objectives: "inducing it to seek simultaneously the publicity on one hand and on the other hand the confidentiality from which conciliated settlements spring." <sup>119</sup> England has encountered similar problems, and it has been stated that one of the gravest defects of England's

commission has been seen that one agency is responsible for both promotional and enforcement roles.<sup>120</sup>

One issue that should be raised is the emphasis on voluntariness, on educating, on getting people to respond rationally and on achieving friendly settlements. At the time these legislations were originally drafted, there was a belief that, given proper information, the respondent could not help but automatically change both his behavior and his attitudes:

Modern day human rights legislation is predicated on the theory that the actions of prejudiced people and their attitudes can be changed and influenced by the process of re-education, discussion, and the presentation of dispassionate socio-scientific materials that are used to challenge popular myths and stereotypes about people...Human Rights legislation on this continent is the skillful blending of educational and legal techniques in the pursuit of social justice. 121

With the advent of the human rights legislation, sociology was in its halcyon days, it being felt then that attitudinal prejudices were the only forces at work and that education could easily remedy the problem. After twenty-five years one wonders if that approach may be, not necessarily misconceived or naive, but simply insufficient.

Voluntary implementation of programs, for example, does not seem to have worked as effectively as might have been hoped. The Canadian Human Rights Commission has noted that, while it has tried encouraging voluntary action in employment equity, the results have been particularly disappointing. Out of 900 employers, only 34 had equity plans, in part, because some

companies saw employment equity as "yet another" new vehicle for governmental intervention into management's domain. Similarly, employers are not availing themselves of the opportunity of affirmative action.<sup>122</sup> As far as business is concerned, there is no economic advantage to engaging in these particular courses and no economic disadvantage to not participating in them. Indeed the most right wing detractors of the legislation are quite willing to illustrate the economic disadvantage they suffer by adhering to the legislation.<sup>123</sup>

One must remember business and institutional responses may have little to do with lack of information or intention to discriminate. Businesses' reasons for following a particular course of action have more to do with "the financial bottom line". Reasons vary, but often it is not personal bigotry that is responsible. Instead, on occasion, it is the impression that customers wouldn't like natives or Pakistanis serving them and will go elsewhere.<sup>124</sup> Social conformity becomes the response.<sup>125</sup> In other situations it is simply following a policy or procedure that has "always" been in place. Business-wise, it is expedient to maintain the policy, as change costs money.

While business certainly relies on information, more often than not, the information comes from economic studies not sociological ones, and arguably, if one is sincerely concerned with protecting human rights, it is imperative to respond to business in a way that is going to affect the balance sheet. Recently, even the Canadian Human Rights Commission has suggested that it is more important to "focus more on the

forces of discrimination and less the dynamics of attitudinal prejudices." As they have put it, it is no good to simply tell a corporation to change its ways and become a good corporate citizen. 126

It is submitted here that there are at least two forces to which companies will respond- firstly increased liability (with attendant damages, costs and interest payable ) through a civil suit and secondly the accompanying negative publicity. Even where actions do not make it to court, there is a block of time during which the complainant can use the media and its predisposition to generate negative publicity against the respondent so as to strengthen her position prior to or during negotiations. In this way the public receives its information and the respondent faces the dual costs of adverse publicity and financial sanctions.

## V. Conclusion

This chapter has considered the limitations of the present human rights legislations and considers these as a significant problem to the goals of rights protection. An alternative must meet many of these weaknesses. The next chapter offers one possibility- tort law.

## FOOTNOTES CHAPTER 4

1 Saskatchewan Human Rights Commission v. The Engineering Student's Society (1989), 10 C.H.R.R. D/ 5636 (Sask. C.A.).

2 C.Allard, "Sask. Human Rights Code can't muzzle student paper" *Lawyers Weekly*, March 17, 1989, at 11.

3 S.14 (1) of the Saskatchewan Human Rights Code states:

No person shall publish or display, or cause or permit to be published or displayed on any lands or premises or in a newspaper, through a television or radio broadcasting station or any other broadcasting device or in any printed matter or publication or by means of of any other medium that he owns, controls, distributes or sells, any notice, sign, symbol, emblem or other representation tending or likely to tend to deprive, abridge, or otherwise restrict the enjoyment by any person or class of persons of any right to which they are entitled under the law or which exposes or tends to expose to hatred, ridicules, belittles, or otherwise affronts the dignity of any person, class of persons or a group of persons because of his or their race, creed, religion, colour, sex, marital status, physical disability, age, nationality, ancestry or place of origin."

S. 14 (2) : "Nothing in subsection (1) restricts the right of freedom of speech under the law upon any subject. "

4 *Supra* n. 1 at 5644.

5 *Supra* n. 1 at 5643.

6 *Supra* n. 1 at 5645.

7 This whole approach is addressed in the Supreme Court of Canada decision in Jantzen v. Platy, [1989] 1 S.C.R. 1252 reversing (1986) 43 Man. R. (2d) 293; (1985) 38 Man R. (2d) 20 ( Q.B.).

8 The judgment involves an interpretation fixed to a historical point in time. To that extent, it purports to consider only the intention of the legislative drafters. in doing so, it harkens to one type of American jurisprudential analysis.

For a similar type of case in Manitoba, but this time involving race, the human rights board had no difficulty construing "editorial comment" as "any other representation". Linklater v. Winnipeg Sun (1984) C.H.R.R. D/ 2809 (Man. Bd. of Adjud.). However in the same province and in the same year editorials against natives were not seen as falling within the idea of " other representation" Warren v. Chapman (1984) 5 C.H.R.R. D/226 [ 1984] 5 W.W.R. 45, 29 Man. R. (2d) 172 ( Man Q.B.).

9 Freedom of speech is a federal preserve- A.G. Can and Dupond v. Montreal [1978] 2 S.C.R. 770. Nonetheless, Saskatchewan has just announced that they are going to amend the impugned section.

10 W.S.Tarnopolsky & W.F.Pentney, Discrimination and the Law (4th Cum. Suppl) (De Boo, Aug 1988) at 337.

11 Ibid at 338 .

12 Race Relations and the Law. Report of a symposium held in Vancouver, British Columbia, April 22-24, 1982. at 97.

13 Ibid. at 98 .

14 For examples, see Nova Scotia's Human Rights Act, S.N.S. 1969, c.11 as am. at s. 8 (4) ; Newfoundland's Human Rights Code, R.S.N. 1970, c. 262, as am. at s. 6 (d) (i) and (v). Alberta's The Individual's Rights Protection Act, R.S.A. , 1980, has similar provisions at s. 13 (1) , as does Saskatchewan Human Rights Code, S.S. 1979, c. S- 24.1 at s.48. Some of these are seen as justified in that they are dealing with affirmative action type programs.

15 Manitoba's Human Rights Act, C.C.S.M., c H175 as am. at s. 3 (4) - age of majority; Saskatchewan's Code at s. 2 : 18-65 years, Alberta's Act - s. 38 age means over 18.

16 E.W.Vierdag, The Concept of Discrimination in International Law ( The Hague: Nijhoff, 1973) at 61.

17 Ibid. at 64 and 111.

18 This was the approach taken in the Belgian Linguistics Case ( Merits) as reported in D.J. Harris, Cases and Materials on International Law, 3rd ed. (London: Sweet & Maxwell, 1983), at 526-528. The question becomes is there a way of achieving the same ends with a lesser burden on the minority. One must watch out though, there is the problem of each instrument having its own limited goals and ends, which may limit its ability as a principle for extrapolation.

19 Universal Declaration of Human Rights (G.A.O.R. 217A, (III)) G.A.O.R., 3rd Sess., Part I, Resolutions, p.71), Article 29.

20 For an application of "bona fide occupational requirement" see Gauthier v. Canadian Armed Forces (C.H.R. Comm.) as reported in Lawyers Weekly , March 10, 1989, at 17.

21 The Supreme Court of Canada has recently tackled some of the issues of bona fide requirements in Alberta Human Rights Commission v. Central Alberta Dairy Pool ( Decision No. 20850, rendered September 13, 1990).

22 J. Whyte, "Is the Private Sector Affected by the Charter" in L. Smith et al (ed.) Righting the Balance: Canada's New Equality Rights (Cdn. Human Rights Reporter Inc, 1986), 145 at 157.

23 The consequences of this labelling are discussed at length in the Chapter 7 in the case of Bhadauria v. Seneca College.

24 Ontario has a case Betty Henry v. L.C.B.O. dated August 5, 1980 where there was an award of \$8000 in general damages for sex discrimination.

25 S.O. (1981) c. 53, s. 40 (1) (b), s. 43 (1).

26 Actually, the highest award for injury to feelings seems to have been Manitoba in 1986 (\$7500), but apparently this involved three separate events. As well, the complainant was awarded \$15000 for lost wages. Wadahawan v. McDonald Supply Co Ltd. (1986) 8 CHRR D/3858 (Man. Bd. of Adjud.) - There were three separate incidents involved though, so not the amount is not really all that high.

In a settlement case involving white employees quitting work after refusal to implement their employer's bigoted views, \$8000 was paid to each five former employees, in addition to \$253,796 for lost wages. See "Race bias settlement biggest to date", Jan. 1989 Cdn H.R. Adv. 4. Although the money paid was only part of the settlement negotiated by the Commission, Majestic Electronics' lawyer is reported as saying that the president of the company decided that rather fight the matter he would, "close the book, write a few cheques and get on with the business of selling electronics". One wonders if the matter had been brought to human rights commission's attention only by the people who suffered the racial invectives of this person (the person discriminated against), rather than by well placed and well paid white employees, whether the matter would have turned out as nicely.

27 The Supreme Court touched upon this subject of the relationship between quasi-criminal fines and exemplary damages in Janzen v. Platy, [1989] 1 S.C.R. 1252 reversing (1986) 43 Man. R. (2d) 293. However, all the SCC said was that \$3000 award in the circumstances of the case was not inordinate in light of the circumstances.

It should be pointed out that fines go to the State only and typically are connected with some property issue. Damages in this case however relate to the consequences. Lawyers Weekly, May 26 1989.

28 R.S.A. 1980, c I-2.

29 See Fernando v. Alberta Union of Public Employees (1984) 6 CHRR D/2566. The case purported that no general damages would be allowed because s. 31 (1) (b) (v) says get general damages only where putting the person in the position would have been but/for the contravention of the act.

However, more recently in Splett v. Sum's Family Holdings, 1991, C.H.R.R. D/119 (Alta Bd. Inq.) \$1500 was awarded for mental distress in a sex harassment case in Alberta under the heading "general damages" and it was pointed out that although the Act did not expressly refer to general damages, in the circumstances of the case these could come under the meaning of s. 31 (b) (v) .

30 Hawkes v. Brown's Ornamental Iron Works of Belleville Ltd. Ont. Bd of inquiry, Soberman Chairman, 12 th Dec. 1977 (unreported) (employment, sex and age). For more recent discussion on the role of compensation see Morgoch v. Ottawa ( City) No. 2 , (1990) 11 C.H.R.R. D/91 (Ont Bd. Inq.).

31 Peters v. United Cabs Victoria, (1989) 10 C.H.R.R. D/5430 ( B.C.H.R. Council) It is notable that damage awards are higher in sexual harassment cases, assumingly for "the obvious reason that type of discrimination causes significant psychological injury". Tarnopolsky & Pentney, supra, n. 7 mention this assumption.

32 Cassidy v. Sanchez (Tony's Place) (1988), 9 C.H.R.R. D/5258 (B.C.H.R. Council).

33 Peters, supra n. 31. One might wonder what the sum would have been if the situation involved a) a male white or b) black passenger.

34 Re Dakota Ojibway Tribal and Bewa, [1985] 24 D.L.R. (4th) 374 (Man.C.A.) and Janzen v. Platy , supra n.27 .

35 It has been pointed out that, historically, a male reputation has been legally protected, but similar harms females face have not. A good example of a condescending type of reaction came from Manitoba Appeal Court Judge Huband in Janzen v. Platy who gave the exceptionally minimalizing example a school girl fending off the flirtatious advances of a school boy. In this ridiculous example the judge tried to parallel sexual harassment in the workplace with "friendly overtures".

36 Canadian Human Rights Commission 1987 Annual Report, at 11.

37 Robichaud as mentioned in CHR Adv. Jan. 1990 at 6.

38 Gosse v. Town Council of Tilton, (1984) 5 C.H.R.R. D/2299 (Nfld. Comm. of Enquiry). Other provinces can be as bad. See Fitzherbert & CHRC v. Underhill (1991), C.H.R.R. D/105 where a female truck driver was awarded \$100 for "hurt feelings" after her job was given to the employer's relative.

39 Ibid. Discrimination on the basis of sex gets \$50 damage.



40 S.Day, "Impediments to Achieving Equality" in Equality and Judicial Neutrality , S.L. Martin and K.E. Mahoney eds. (Carswell : Calgary, 1987) 402.

41 Ibid.

42 C.H.R.C. 1987 Annual Report at 11.

43 Ibid. p. 11.

44 Re Saskatchewan Human Rights Commission and Citation Investments Ltd. et al (1986) 7C.H.R.R. D/3531, affirmed 7 C.H.R.R. D/3464 , affirmed (1988) 8 C.H.R.R. D/4166 ( Sask. C.A.) ( action against landlords).

45 A. Petter, " The Charter and Private Action: The impact of Section 15 on Human Rights Codes", (1984) 5 C.H.R.R. c/84-3 and 4. Andrew Petter goes on to examine how the Codes protect only certain "private" relationships, but feels that the failure of the codes to apply to other private relationships would not have much chance of success as a form of discrimination on an unenumerated ground . But see Murray v. Toope where the Nfld Bd. of Inquiry asked for argument on the issue of the Newfoundland Code possibly violating the Charter by not being open-ended. (1991) C.H.R.R. D/ 94.

46 In article 26 of the International Covenant of Civil and Political Rights it is emphasized that

all persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.(emphasis added)

Similarly, the Universal Declaration states in Article 7 : "All are equal before the law and are entitled without discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against incitement to such discrimination. "

47 S.N. Lederman and A. Ristic, "The relationship Between Federal and Provincial Rights Legislation and Charter Equality Rights" in L. Smith et al eds. Righting the Balance: Canada's New Equality Rights (Cdn. Human Rights Reporter Inc, 1986), p. 83 at 92.

48 R. v. Turpin, [1989] 1 S.C.R. 1296.

49 This was an issue similar to one the Court had previously considered under the Canadian Bill of Rights in R. v. Burnshine [1975] 1 S.C.R. 693, [1974] 4 W.W.R. 49, 25 C.R.N.S. 270, 44 D.L.R. (3d) 584. In R. v. Burnshine the Court found that the Bill was not violated by a provision in the Prison and Reformatories Act R.S.C. 1970 c. C-34, s. 150 made applicable only to British Columbia. Equality before the law under the Bill did not mean the right of each individual to insist no statute could be enacted which did not have application to everyone and in all areas of Canada. This was the approach the Court of Appeal took in Turpin - seeing "absolute uniformity of criminal procedure as it applies throughout Canada as impossible or undesirable, especially given historical differences". Only where the differences were "invidious", "irrational" or "unfair" could there be considered to be "discrimination" for the purposes of s. 15.

By way of contrast, the Supreme Court noted that equality before the law now involved different considerations than under the comparable provision in the Canadian Bill of Rights, mainly because whereas previously sovereignty would have been decisive, now the Charter existed as a standard against which all legislation must be measured.

50 Turpin, supra n. 48 at 1300.

51 R. v. Drybones, [1970] S.C.R. 283 at 297.

52 Andrews v. Law Society of B.C., [1989] 1 S.C.R. 143, [1989] B.C.D. Civ 1831-01 (S.C.C.).

53 Ibid., McIntyre. Basically, the analysis in Andrews is composed of two steps 1) whether the distinction created by the impugned legislation results in a violation of one of the equality rights and if so 2) whether the distinction is discriminatory in its effect or purpose.

54 Turpin, supra n. 48 at 1316.

55 In that respect, persons accused of s. 427 crimes in all provinces except Alberta were not an "discrete and insular minority". The result in the case was surprising to many in that it meant that it was not a fundamental principle that the Criminal Code law apply equally throughout the country. p. 42, S.C.C., R v. Turpin.

56 Once again this falls considerably short of the international definition of discrimination, with its need for "sufficient connection".

57 Dolphin Delivery v. R.W.D.S.U. Loc. 580, [1987] 3 W.W.R. 673 (S.C.C.). For C.A. decision see [1984] 3 W.W.R. 481.

58 K. Norman, "Problems in Human Rights Legislation" in S.L. Martin and K.E. Mahoney eds., Equality and Judicial Neutrality (Carswell : Calgary, 1987) 391 at 394.

- 59 Ibid. at 395.
- 60 S.O. 1981 c. 53, s. 33 (1) (a).
- 61 Newfoundland ( Min. of Justice) v. Newfoundland ( Human Rights Commission) 1 C.H.R.R. D/ 305 ( Nfld. S.C.Tr.Div.).
- 62 Compare s. 32(1); S.O. 1981 c. 53 , s. 41 (3), R.S.A. 1980, c. I-2, s. 33 (2) and s. 33 (1). With respect to appeals, see "B.C. decisions unappealable, Court rules", August 1990 Can. H.R. Adv. 9 referring to Fraser v. Victoria Police, City of Victoria and Paul's Restaurant. The case states that right of appeal must be expressly conferred by the legislation and , as it is not expressly conferred in the B.C. Act , there will be no right of appeal.
- 63 S.S. 1979, c. s- 24.1, s. 32.
- 64 R.S.A. , 1980, c.I-2, s. 33 (2).
- 65 W. Black and L.Smith, " Notes on Bill-27" 4 C.H.R.R. C/83-11.
- 66 According to federal statistics- 10 % of all complaints entered at the Commission are out of time.
- 67 S.O. c. 53, s. 33 (1) (d).
- 68 R.S.A. , 1980, c. I-2, s . 6 (6) (b). This, of course, would apply also to the Government paying out.
- 69 Saskatchewan (Human Rights Comm.) v. Saskatchewan (Department of Social Services) ( 1989), 10 C.H.R.R. D/ 6272 ( Sask. Bd. of Inquiry).
- 70 S. Day, supra, n.40 at 403.
- 71 Ibid. at 40.
- 72 Ibid.
- 73 Chapter 3.
- 74 Chapter 6.
- 75 B.C. Human Rights Coalition v. B.C. (Min. Human Resources (1987) C.H.R.R. D/4275 (B.C.Human Rights Council).
- 76 Human Rights Comm (Sask) v. Citation Invt. Ltd. (1986) 7 C.H.R.R. D/3531 affirmed 7 C.H.R.R. D/3464 which was in turn affirmed in 8 C.H.R.R. D/4166 ( Sask. C.A.) (action against landlords).

77 In L.C.B. O. v. Karumanchiri ( 1988) 19 C.C.E.L. 172 the Divisional Court confirmed that without an express statutory provision, there could not be costs.

78 See Adams v. Bata Retail, (Ont. H. R.Comm.) as cited in Lawyer's Weekly, Jan. 20 1989, 32 .

79 1987 C.H.R.C. Annual Report. p. 11. An example of this would be the Robichaud case where the Commission found the case involving allegations of sexual harassment as unfounded, but Robichaud carried the case on her own all the way to the Supreme Court. The case was significant for establishing the concept of a statutorily imposed liability on corporations for the actions of their employees.

80 S. Day, supra n.40 at 404. Some have suggested that commissions should go even further and indeed challenge the legal system itself. They could initiate public discussions with leading legal experts of the possibilities of class action suits against companies, agencies or other institutions that practice discrimination. See Hill, D.G. Human Rights in Canada: A Focus on Racism, (Canadian Labour Congress, 1977) 38.

81 In Re Kondellas and Sask Human Rights Commission [1987], 2 W.W.R. 195, 87 C.L.L.C.17,006, 52 Sask. R. (Sask. Q.B) an inquiry was stopped by the court on the basis that the excessive delay (Aug 1982 -complaint, Dec. 1986 - court heard it) had made this a violation of the defendant's Charter rights.

82 Gohm v. Domtar (1988) 19 C.H.R.R. D/ 5968 ( Ont. Bd. of Inquiry) The Board of Inquiry refused to dismiss a complaint filed in 1981 where the commission decided to hold the case in abeyance pending the outcome of appeals in other cases involving a similar issue. The Board noted that dismissal for delay should be used sparingly and only when it would appear there was an "abuse of process".

83 I. Hunter "Legal Rights, the Charter and the Ontario Human Rights Code", (1985-6) 6 Advoc. Quar., 162 at 183.

84 The court in at least one case (Kondella, supra n. 81) has dismissed a complaint because of the long delay involved in that case. The excessive delay was seen as impeding the respondent from getting any justice. First complaint was lodged in August 1982, the second in May 1983. Finally by December 1985 the Commission directs board to investigate. August 1986 respondent applies to court to prevent further proceedings.

85 Ibid. One might question the court's response in Kondella - the defendant/respondent knew of the "charges" and knew he was under investigation. etc. Would a criminal charge have been allowable in this case. Court felt this would have been convicting him in the eyes of the community.

86 Article 8, Universal Declaration of Human Rights (G.A.O.R. 217A, (III) G.A.O.R., 3rd Sess., Part I, Resolutions, p.71).

87 Article 14 of International Covenant on Civil and Political Rights, U.K.T.S. 6 (1977), Cmd. 6702; 61 A.J.I.L. 870 (1967).

88 S. Day, *supra* n.40 at 406. Also, of course, Kondellas, *supra* n.81.

89 The change in the legislation may have been just one part of political shift in respect of the the human rights board in B.C.

R. Knopff, "Human Rights Litigation, 1956-1984: A Statistical Profile" 8 C.H.R.R. C87/1 at C87/2 notes that in comparison to the previous 5 year period, 1980 to 1984 showed a a substantial drop (1/3 less) in the number of complaints coming before the B.C. board.

90 W. Black & L. Smith, *supra* n. 65. By removing the " without reasonable cause provision" individuals and groups who had faced discrimination on the basis of physical disability, sexual orientation and immigrant status, would no longer be covered. The only parties to the inquiry now are the complainant and respondent. Previously Commission would have helped the complainant who now has to get own legal counsel. With respect to appeals, see *supra*, n. 62 "B.C. decisions unappealable, Court rules".

91 K. Norman, *supra* n. 58 at 394. See Fields v. Ueffing (1985) 12 Admin. L.R. 115, 6 C.H.R.R. D/2711 (B.C.S.C.).

92 S. Day, *supra* n. 40 at 407. Part of the problem is that the Council can be composed of no more than five members to serve several million people. In comparison, Manitoba's Commission's is composed of thirteen members serving a fraction of the B.C.'s population.

93 K. Norman, *supra* n. 58 at 391.

94 S. Day, *supra* n. 40 at 407. See also comments made in respect of Schapp & Lagace v. Cdn. Armed Forces in " Courts rejects regressive Tribunal decision" Feb, 1989 Cdn. H.R. Adv. 5. in which it is noted that community groups argued that the 1985 Review Tribunal was overloaded with Conservative partisans and persons with strong establishment ties.

95 Ibid. Purported considerations of "fiscal restraint" or at least "taxpayer accountability " have been entering into the federal human rights scene lately, when the federal human rights commission turned down a human rights tribunal recommendation that they pay the costs of the complainants independent counsel in Hinds. See Lawyers Weekly "Discrimination victim lost confidence in C.H.R.C. but won't recover legal costs", November 4, 1988 at p.19.

96 K. Norman, *supra*, n. 91 at 397.

97 Ibid.

98 Ibid. at 398.

99 Ibid. at 397.

100 J.M. Evans, H.N. Janisch, D.J. Mullan et al (eds.) Administrative Law (Edmond Montgomery: Toronto, 1984) at 594.

101 Admittedly, at times this requirement creates difficulties and some writers concede that

this requirement raises difficult issues in complex modern government where decision makers are not normally expected to act solely on their own, or at least to some degree, to overall government policy. Here the tenets of sound administration may conflict with legal values which insist that discretionary authority be exercised on an individual and not on a collective basis. (Ibid. at 603).

102 S. Day, *supra* n.40.

103 I. Hunter, *supra* n. 83 at 183. Presumably, among the potential disadvantages to the prolongation is that witnesses die, memories fade and evidence is lost.

In a decision that, for other reasons has been scathingly denounced (and rightly so), Q.B. Justice Richard Miller saw the N.B. Code as not protecting respondents enough. See "N.B. schools ruled outside of human rights code", Feb, 1989 Cdn. H.R. Adv. 7. referring to Attis v. District 15 Board of School Trustees.

104 From the perspective of some, this tact is appropriate. See Affirmation 4:3 (1983) 2. However, also see I. Hunter, *supra*, n. 83 at 177. Also, Tarnopolsky, W.S. "Iron Hand in the Velvet Glove", (1968) 46 Can. Bar Rev 565. For a case where this actually occurred see: Re Bulger (1978) 45 N.B. R. (2d) *sub nom. Bulger v. Royal Canadian Legion Branch No. 4* 118 A.P.R. 1 (N.B. Bd. Inquiry).

105 I. Hunter, *supra*, n. 83.

106 Canadian Human Rights Commission 1985 Annual Report.

107 For example, in the use of balance of probabilities and the "but/for" test, see Saskatchewan's Human Rights Code, s. 31 (7).

108 When considering the Canadian Human Rights Commission as an example, it is small wonder that respondents have the impression they are "on trial". Of the tribunal panels for the CHRC there are 71 members, 40 of whom are lawyers. Where a one member tribunal is convened, that one person must be a lawyer and on a three member panel, at least one must be a lawyer. See CHRC Dossier, 86.

This reliance on lawyers may be part of a trend in Canada in which the difference between administrative tribunals and the courts has narrowed considerably over the years. Traditionally, a

"judicial function" was seen as the determination of "pre-existing rights and liabilities" through the application of a "fixed objective standard" and the "administrative function" was viewed as the creation of rights and liabilities through "policy and expediency". Where courts were required to apply "natural justice", tribunals were mandated only to act "fairly". That standard in decision-making has changed substantially so that the difference between the two is now less clear. *Supra*, n.100 at 57.

However, Potapczyk v. McBain (1984) C.H.R.R. D/2302 says there are still differences. For example, that s. 11 (d) of the Canadian Charter does not apply to tribunals, civil or administrative proceedings, but only to criminal or penal sanctions.

Depending on the type of board (human rights, labour arbitration, medical advisory etc.) there may be not only the responsibility to give the defendant notice to give opportunity to respond, but also duty for disclosure of evidence against him, the duty to give official notice of reasons for the decision and, on occasion, the right to have counsel present. However, with regard to human rights boards, again, there is not a significant degree of uniformity across provinces with regard to the procedural protections available for the respondent. For example, whereas federally, copies of investigators reports go to the defendant, it may not be compulsory elsewhere. Syndicat des Employes de Production du Quebec et de l'Acadie v. CHRC and CBC and AG Can. (SCC) October 12, 1989 states that the Canadian Human Rights Commission is not acting in a judicial or quasi-judicial capacity when it decides whether to pursue a complaint. It is not required to afford the parties the full range of procedural rights known as natural justice, but rather observe procedural fairness. CHRR December, 1989 p. 2.

109 I. Hunter, "Liberty and Equality : Tale of Two Codes"(1983), 29 McGill L.J. 1 at 16. This characterization, however, fails to consider that a continuing violation is occurring. The law regarding injunctions has long recognized that it does not make sense that a person should have to return to a forum and go through all the preliminary steps, time and again. Alternatively, if there is repetition of the matter, the clock on the limitation period would start running anew against the defendant anyhow.

110 I. Hunter, *supra* n. 83 at 172.

111 I. Hunter, *supra* n. 105 at 16.

112 Hyman v. Southam Murray Printing Ltd. (1981) 3 C.H.R.R. D/617 (Ont. Bd. of Inquiry). The principles of res judicata have not been seen as precluding inquiry under the Ontario Human Rights Code where grievance arbitration has already been undertaken.

Potapczyk v. McBain (1984), C.H.R.R. D/2302- s. 11 (d) of Charter not apply to civil or administrative proceedings, only where there are criminal or penal sanctions.

113 Hunter v. Southam [1984] 6 W.W.R.577, 41 C.R. (3D) 97, 55 A.R.291, 11 D.L.R. (4th) 641 (S.C.C.).

114 Ian Hunter, *supra* n. 83 at 184.

115 The P.E.I. legislation specifically incorporates that standard into its penal provisions as well, see S.P.E.I. 1975, c. 72, as am. s. 29 (2).

116 W.S. Tarnopolosky, "The Control of Racial Discrimination" in R. St. J. Macdonald & John Humprey (eds.) The Practice of Freedom, (Butterworth: Toronto, 1979) 304.

117 *Ibid.*

118 Kondella, *supra* n. 81 notes that a human right violation is not an "offence" so as to come under the Charter s. 11.

119 J. Hucker and B.C. McDonald, "Human Rights in Canada", (1969) McGill L.J. 220 at 227.

120 U. Prashar, "Race and Law" in Race Relations and the Law Report of the Symposium in Vancouver, B.C., 1982 (Minister of Supply and Services Canada, 1983) p. 88 at 122.

121 D. G. Hill, "Merchants of Hate", Human Relations, June 1965, published by the Ontario Human Rights Commission, 4 as quoted in W.S. Tarnopolsky & W.F. Pentney, Discrimination and the Law, (Toronto: De Boo, 1982) p. 32.

122 Canadian Human Rights Commission 1985 Annual Report.

123 For this ideological bent see, for example, Block, W. & Walker, M (eds.) Discrimination, Affirmative Action and Equal Opportunity, (Vancouver: Fraser Institute, 1981).

124 P.G. Que. c. Service de Taxi Nord Est (1984) 7 C.H.R.R. D/ 3112 (C.S. Que.) This taxi company normally uses a cue system. Here, the company uses lots of black drivers but bows to customer pressure who wanted white drivers- the company engages in "jumping that cue" procedure to let passenger have a white customer. This nevertheless is seen as discrimination.

125 Race Relations and the Law, Report of a symposium held in Vancouver, British Columbia, April 22-24, 1982 at 112.

126 C.H.R.C. Dossier 86-5, p. 1. Although they seem to be suggesting that it is important to precisely set out to the company what needs to be done, as opposed to a blanket order with no direction.



CHAPTER 5 :  
THE DEVELOPMENT OF TORTS  
IN THE PROTECTION OF HUMAN RIGHTS  
PART I

**I. Introduction: Tort Law's Consideration of Human Rights Interests**

Tort law, historically, has been considered as a mechanism for handling specific proprietary and personal interests. Yet some of torts' earliest forms alternatively may be characterized as dealing with human rights and basic civil liberties. It is possible to draw parallels between the various articles of the Universal Declaration of Human Rights, which may be considered as quintessentially representing agreement among nations about basic human entitlements, and various categories of torts.

For example, the torts of assault and battery offer redress for security of the person,<sup>1</sup> thus paralleling Article 3 (life, liberty, and security of the person) and Article 5 (cruel, inhuman or degrading treatment or punishment) of the Declaration. Trespass, from which torts dealing with invasion of privacy spring, covers ground similar to the privacy provisions of Article 12 of the Universal Declaration. The tort of defamation similarly coincides with other aspects of Article 12 (those of honour and reputation of the person). False imprisonment fits under either Article 3 or Article 9 (arbitrary arrest, detention

or exile). Even old family law torts fall under the same kinds of interests protected as Article 12 of the Universal Declaration (arbitrary interference with privacy, family, home or correspondence) and Article 16 (protection of the family as a unit).

Admittedly, the term "human rights " was never explicitly attached to these actions. That phrase, here identified, is very peculiar to the twentieth century. Nevertheless, the styles of action at least demonstrate that tort law principle has been capable of protecting human rights interests.

Other indicators of tort law's consideration of and protection of human rights exist. As early as the 1890s , it was recognized that two or more people acting together, on racial grounds, to prevent another from obtaining residential accommodation might constitute civil conspiracy.<sup>2</sup> More recently, the appeal court judgment in Bhadauria v. Seneca College set out the progression of a very gradual movement of tort law against discrimination. Even communal rights to matters such as a safe environment have been tackled through torts, by way of the law of nuisance.<sup>3</sup>

Nevertheless, one must be careful not to overstate the case. Many torts have also been viewed as having a proprietary base, as opposed to a human rights foundation. Also, unfortunately, many of the categories of tort are narrow in scope,<sup>4</sup> each having peculiar rules and defences seemingly anathematic to human rights protection.<sup>5</sup> Finally, what is

generally considered to be one of the most fundamental of rights, that of life, has not been protected by the common law.<sup>6</sup>

However, of even more interest to those working in the area of protection of human rights is the current trend in Canadian courts, one of expansionism and plaintiff orientation in the area of tort law: "The 1980s can be viewed as a decade when Canadian courts treated the law of torts as an increasingly useful mechanism for providing compensation and in doing so further developed it as a vehicle for the fair and just distribution of societal resources." <sup>7</sup> This trend can be seen as a willingness in some judicial quarters to open opportunity and move toward a more equitable treatment of people. It has been noted that

In its recent dramatic expansion, tort has interestingly overlapped and integrated with other branches of law such as ...human rights law ... in ways which supplement and enrich those areas. The enrichment comes because tort law has at its base the idea of communal responsibility- imposed obligations on every person and institution to respect the foreseeable interests of others...<sup>8</sup>

This chapter sets out that trend- how tort law principles have expanded in ways compatible with the protection of human rights. At the same time the chapter points to the advantages that tort actions offer.

## II. The Advantages of Tort Action

The favorable aspects offered by tort law to human rights plaintiffs take procedural and substantive directions, as

well as political ones. However, as tort law can move into areas untouched by the legislation, it is in terms of the substantive law that the advantages to the complainant will be the greatest. The flexibility of tort law and its present overall trend to expansion of liability offer protection in ways that might not otherwise be politically available.

Once again, to understand why human rights legislation is typically weak and how tort law can augment the position of the aggrieved party, it is important to remember what is involved or is at stake in changing the law in this area - that is, the effective use of political power. It has been noted that in respect of legislated human rights protection, often "...the beneficiaries of the legislation are poor, unskilled at legislative maneuvering from simple inexperience and badly distributed to make the most of their political potential."<sup>9</sup> Firstly, a minority group may be hard-pressed to believe in the political process at all. Secondly, being segregated or isolated itself limits representation of the group's interests. For example, even a high concentration of a Chinese population or a homosexual population in specific districts of a city will generate, at best, only a few seats in legislature. Consequently, their impact as a group may be negligible on the overall direction of the law.

By way of contrast, tort law relies less on the status quo of political power. It, instead, requires a good legal issue and a good solid case where a judge can feel that she or he is meting

out "justice", in the basic sense of the word, regardless of who the majority or the minority is.

#### A. Procedural Advantages:

While the procedural weaknesses of human rights legislation has already been discussed at length, a few strengths of tort law deserve mention here :

Tort law offers the procedural advantages of operating under considerably wider time limitations in which to bring the action.<sup>10</sup> Also, unlike the remedial provisions of the human rights codes, in a tort case it is the individual who controls the action, not another body like a Commission or a Minister. This becomes important in situations where the Commission's and the complainant's positions diverge after the preliminary investigatory stage. As the Commission cannot be compelled to recommend appointment of a Board of Inquiry, and the Minister cannot be compelled to do so either, the complainant may be left unrequited.

In such cases where positions do differ, it has been suggested that the plaintiff could at that point carry the action at his own expense,<sup>11</sup> it being felt that this ability to make decisions for oneself about what is best for oneself (and to live with the consequences) is intimately tied to the concept of personal autonomy. One must be careful not to overstate this proposition because other priorities enter into the equation.<sup>12</sup>

Still, other procedural advantages come to mind. Any lawyer will readily acknowledge that payment of interest is

extremely very important to a case, as it can sometimes exceed the amount of the damages. Although payment of interest on damages has been allowed in one Ontario human rights complaint, in most other jurisdictions it is not given.<sup>13</sup>

Additionally, courts have a wider power of examination for matters such as confidential records than do commissions. This is particularly important as it is a restriction that makes it more difficult for commissions to carry out their mandate effectively in the first place.<sup>14</sup>

Costs, of course, are routinely given in court actions. By way of contrast, however, the Ontario Human Rights Board has declined to give it, citing that an award of costs to the successful party was not expressly provided by the Code. Moreover, the board saw its role as solely giving compensation, as opposed to establishing costs.<sup>15</sup> This is an unduly restrictive interpretation of its role. Such an argument might hold if costs were punishment to the respondent; however, they are not. Assuming that the respondent's actions caused the complainant to bring the claim in the first place, then the complainant would not have incurred the cost if she had not been wronged. Part of compensation for the victim may very well be costs,<sup>16</sup> but so far those working under the human rights legislation have failed to recognize that as legitimate part of their jurisdiction.<sup>17</sup>

Class actions as set out by tort law similarly offer promise to the human rights area. Canadian judges have begun to recognize that class actions can carry significant advantages by

reducing the multiplicity of actions in a way that is economical for both court and the parties. As the cost of litigation can be spread among many, class actions permit the litigation of monetary claims too small to support an action by an individual and assure recovery on claims that would not otherwise be enforced. Not only is access to justice improved, but the class proceedings may serve a deterrent function by preventing unjust enrichment or imposing an appropriate measure of costs upon the defendant.<sup>18</sup>

In Canada, class actions are allowed to proceed where, without evidence from individual class members, the defendant's liability can be established in common proceedings. "Common proof of this kind may be possible in cases where the class is attempting to recover a benefit that the defendant has received from the defendant's records or from the records of some other body. Once the total amount of the defendant's liability has been determined through an 'aggregate assessment' of this kind, it may be possible to distribute the resulting fund to class members in relatively informal procedures to which the defendant need not be a party".<sup>19</sup> It is a response that achieves a compromise between a traditional reluctance to engage in 'judicial creativity' in a controversial area and the desire to provide a forum for claims that would otherwise be unenforceable.<sup>20</sup> Human rights situations involving equal pay for work of equal value would lend themselves particularly well to this type of class action.

As mentioned in Chapter 4, class actions often are not permitted by human rights commissions or, where permitted, it is a one-sided event in which claimants can combine, but defendant cannot be joined.<sup>21</sup> Certainly, damages in class actions have not been allowed by the boards.<sup>22</sup>

### B. Advantages through Damages

Each of these procedural strengths - time limits, costs, interest and class actions, are only small advantages compared to that which can be offered by aggravated and exemplary damages, both of which serve a different function in torts.

#### 1. Aggravated Damages

The head of "aggravated damages" is compensatory, in that it indemnifies the plaintiff for the intangible injuries such as distress or humiliation caused by the defendant's high-handed, malicious actions, or his otherwise insulting behaviour. Typically, the consequences to the plaintiff are the principal consideration, rather than the defendant's intention to harm.<sup>23</sup> "The aim of aggravated damages is to soothe a plaintiff whose feelings have been wounded by the quality of the defendant's misbehaviour." <sup>24</sup>

A stereotypic example would be the Chinese applicant who, rather than being told that the job has been filled or that the employer was not presently hiring, was informed "We don't hire Chinks here." In such a case, the conduct of the defendant is taken into account in so far as it affects the suffering of the



plaintiff, whether that be by insult, injury to reputation or mental pain.<sup>25</sup>

Another example of where this might be relevant in human rights considerations would be a blatantly racist act that in result affects the person's standing in his own community. A recent example was the Sikh who unsuccessfully held off an attack on his person by a group of men.<sup>26</sup> In addition to physical harm suffered, he sustained a loss of respect within his own community because, in the Sikh view, he "allowed" himself to be attacked, by failing to adequately defend. Aggravated damages would be appropriate here to compensate for that additional suffering.

## 2. Exemplary Damages

By way of contrast, "exemplary damages" deal more with punishment and with deterrence. While typically we leave that role to criminal law, it is always a judge's duty in whatever manner is appropriate to uphold respect of the law :

In this country we live by the rule of law...Not only must the law sanction the deliberate and callous disregard by the powerful of the weaker person's rights, the law must do what it can to ensure, by whatever means are at its disposal... that the legal rights of a citizen are protected from the tyranny of another. ... in proper cases damages should act as a deterrent to deter the powerful from subjugating the weaker to their business interests.<sup>27</sup>

Consequently, it has been noted: "exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay." <sup>28</sup>

Unlike aggravated damages, actual loss by the person need not be shown for an award of exemplary damages. However, a strong connection between the the plaintiff and defendant must exist in order to avoid a "windfall " to the plaintiff.

At the same time, to merit exemplary damages the defendant's actions must be more than merely inconsiderate of the plaintiff's rights. The actions must be such that they are reprehensible in nature, offending community standards and sensibilities. For that reason judgments involving aggravated damages will typically use such adjectives as "wanton", "in contumelious disregard of the plaintiffs rights", "arbitrary" , "opppressive", "callous", "disgraceful", or, "grossly fraudulent" to describe the defendant's conduct.<sup>29</sup> This form of damages, thus,represents judicial and societal disapprobation of the defendant's conduct.

For the most part, while the kinds of adjectives given describe an intention to harm, it has also been suggested that lack of sinister intent will not preclude exemplary damages, but rather simply reduces the amount awarded.<sup>30</sup> In aggravated damages, the means of the party is always material to the assessment of the damages, in the main, because of an assumption that the purpose of the award is punishment, and that a lesson will be learned only by responding to the means of the party.

Because of the seemingly penal basis, some writers have considered exemplary damages as operating as a civil fine.<sup>31</sup> This may not be an accurate characterization. Unlike a criminal

law fine, the stigma attached to the payment is less here and, unlike a criminal law fine, this recompense goes to the plaintiff, not to the State. The award, in part, counteracts some of the usual disincentives to bringing action. In this way community interests in upholding the law, as well as the individual's own personal interests, are protected.<sup>32</sup>

Nonetheless, over the years some courts have expressed concern that exemplary damages, unchecked, might be used to intrude into the realm of criminal law. In this view fines would not only punish, but operate in a manner without criminal law safeguards. Consequently, in England, the House of Lords in Rookes v. Barnard<sup>33</sup> limited its use to two situations - firstly, where government has abused its power and secondly, where "the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff".<sup>34</sup> With respect to the latter situation, Lord Devlin commented "where a defendant, with a cynical disregard for a plaintiff's rights, has calculated that the money to be made out of wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity." <sup>35</sup>

However, this narrow scope for exemplary damages has subsequently been broadened. As originally noted in Rookes and later elaborated upon in Broome v. Cassell,<sup>36</sup> the courts have recognized that calculating a profit can take a variety of forms:

It is not necessary that the defendant calculates that the plaintiff's damages if he sues ... will be smaller than the defendant's profit. This is simply one example of the principle. The defendant may calculate that the plaintiff will not sue for it at all because he has not the money, or because he may be physically or otherwise intimidated. What is necessary is that the tortious act must be done with guilty knowledge for the motive that the chances of economic advantages outweigh the chances of economic or perhaps, physical penalty. 37

One can think of instances where this might occur, such as an employer in a small community paying women less than the minimum wage, knowing full well that, with few employers in the area, the women are not likely to complain to any official body, and are even less likely to sue.<sup>38</sup>

By limiting exemplary damages to the two categories of governmental abuse and unjust enrichment, the House of Lords explained it was not their role to punish use of power per se, particularly if that was private power:

Where one man is more powerful than another, it is inevitable that he will try to use his power to gain his ends; and if his power is much greater than he might perhaps be said to be using it oppressively. If he uses his power illegally, he must of course, pay for his illegality in the ordinary way; but he is not to be punished simply because he is the more powerful. 39

Arguably, there are many other instances than this where use of power might become abuse of power, either by exercising it for a purpose for which one is not entitled or exercising it

for purposes entitled, but in manner not intended. The community regularly makes decisions in a variety of legal relationships about unacceptable uses of private power that fall well short of "criminal illegality".<sup>40</sup> In each, what is acceptable to the community at large, or conversely what offends our sense of "justice", enters into play.

Perhaps for this reason, other commonwealth jurisdictions have expressed less reluctance in awarding punitive damages in tort cases.<sup>41</sup> Some have realized that "conduct worthy of punishment may often not fall within the scope of the criminal law, or may not be thought to justify prosecution, or if prosecuted, may be insufficiently punished."<sup>42</sup> Canadian courts, for certain, have found tortious liability and, with it, exemplary damages, in circumstances far short of criminality. Once again, other jurisdictions stress Lord Devlin's assertion in Rookes v. Barnard that "exemplary damages can be properly awarded whenever it is necessary to teach the wrongdoer that tort does not pay."<sup>43</sup>

Exemplary damages in Canada have been awarded for most forms of legal wrongs, with the possible exceptions of negligence, deceit, and breach of contract.<sup>44</sup> Yet, even in respect of contract, it has been allowed for interference with contract.<sup>45</sup>

Typically, it has been used in areas where criminal law offers no effective alternative—such as in defamation actions. Arguably, human rights matters are of similar character, in that with the possible exceptions of incidental prohibitions on assaults and racism, criminal law does not focus on human

rights infringements. Others have stressed that exemplary damages should be awarded only if they will in fact achieve some rational purpose, the typical purposes again cited being deterrence, punishment and unjust enrichment.<sup>46</sup> Unfortunately, there is a "Catch 22" situation here: until exemplary damages are forthcoming in a new area, one cannot prove deterrence.

### 3. Damage Awards

The amounts awarded as exemplary damages differ with the facts in various cases, but what is frequently stressed is that the award must be more than an insignificant license fee--the judgment must be proportionate to the situation. In cases where the defendant has realized a profit, the award will, at least, constitute an amount equivalent to that profit. The courts place emphasis on the need for amounts of sufficient magnitude to change the calculus of future actors faced with a similar choice.<sup>47</sup> Once again, the level of award is tailored to the means of the offending party. At the same time, the nature of the award may preclude insurance coverage for it. Adjusted for inflation, the sums are often in the thousands and tens of thousands dollar range, thus sitting far beyond any damage award typically offered by any human right commission.

### 4. Exemplary Damages in the Human Rights Context

Courts have not often had the opportunity to consider exemplary damages within a human rights context. One exception is Constantine v. Imperial Hotels<sup>48</sup> in which a black in

the 1940s was refused accommodation at a hotel. The court gave only nominal damages as the plaintiff was able to find accommodation elsewhere. This view was soundly criticized and it has been suggested that the claim, in effect, was for punitive damages, it being felt that the gravamen of the offence was that the defendant's conduct towards the plaintiff was insulting and was based on the fact the plaintiff was black.<sup>49</sup> Although the plaintiff did not succeed in getting exemplary damages in Constantine v. Imperial Hotel, this case should not dissuade one from the considering the impact of exemplary damages today. Tort law, in general, and exemplary damages, in particular, reflects what the community considers as reasonable or unreasonable behaviour, a standard that has been gradually changing over time.<sup>50</sup>

### C. Substantive Advantages of Torts

Tort law's greater capacity to affect human rights protection lies not so much in its attachment to procedural advantages as in its flexibility and ability for expansion. Tort law maintains its vitality by allowing old actions no longer suited to present societal realities and philosophies to wither and, conversely through the extrapolation of first principles to respond to new circumstances.<sup>51</sup> It is impressed upon those who study and practice law that the categories of torts are never closed. Instead, tort law's role is to respond as justice demands. This next section sets out that expansion.

### 1. Donaghue v. Stevenson

Of course, one of the strongest examples of this capability for flexibility and expansion was the 1932 landmark case of Donaghue v. Stevenson.<sup>52</sup> Prior to Donaghue, liability based on negligence was perceived as only being asserted in connection with particular relationships- innkeepers and their guests, landlords and their tenants, salespeople and their customers. Legally, other categories had remained untouched. In Donaghue a consumer of a defective product suffered the damage. There was no legal relationship between the consumer and the shopkeeper, nor between consumer and the manufacturer.

Lord Atkin in Donaghue stated, while the law was not capable of protecting every instance of moral wrong-doing, it could nevertheless look to an overarching principle to explain where the law and the judiciary should step in. During his analysis, Lord Atkin set out what has come to be known as the "neighbour principle":

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour ... You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.

Who then in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omission that are called into question...<sup>53</sup>

The caselaw that existed to that point was seen as offering specific instances of that same principle. The case effected a



quantum leap in increased responsibility to groups that might heretofore not have been tortiously liable as a legally cognizable category but, at the same time, it limited the range of the complaints and the extent of their remedy.

Donaghue also may have represented a change in tort liability because community standards were changing in respect of what the community was willing to accept as reasonable and fair conduct. To a large extent, "the neighbour principle" became an obligation to obey certain basic standards of behaviour in society.<sup>54</sup> Both the common law "neighbour principle" and basic international human rights standards such as Article 29 of the Universal Declaration which specifically speaks of "duties to the community" act as limits on behaviors and choices, whether those are individual or mercantile ones.<sup>55</sup>

## 2. The Effect of Donaghue

For the purposes of discussion here, Donaghue is important for two reasons. Firstly, the case moved away from seeing tort law as a number of specific rules prohibiting certain kinds of harmful activity. The old-style of reasoning would have left anything not specifically listed as a legally cognizable relationship as being outside the sphere of legal responsibility.<sup>56</sup> Secondly, Donaghue also demonstrated that the judiciary could effectively change what seemed to be the direction of the law to that time by reference to an overarching principle- a tort principle which has a human rights corollary.

Donaghue is also a good example of the fact that, in developing the law, the courts, in the main, work from that which already exists. "It is clear that every judge, however powerfully influenced by considerations of policy, is bound to consider the effect of his rulings on the logical symmetry of the existing law."<sup>57</sup>

This symmetry has both conservative and expansive components. In its conservative form it may try to keep the law much in its present state, considering any large shift by a single case as upsetting that balance. The need for symmetry requires organization of matters in such a way as to avoid anomalies. At the same time that internal order establishes principles which can be extrapolated to fact situations heretofore unconsidered. What might otherwise be considered as anomalies are examined for similarity of first principle that gives answers to new questions.

### 3. The Right to be Free from All Harm:

Admittedly, Donaghue did not venture so far as to see the law of torts as consisting of a fundamental principle that it is wrongful to cause harm to others in the absence of some specific justification or excuse.<sup>58</sup> That is, however, an approach the American courts have been willing to consider for several decades. Known in the United States as the "prima facie tort", the basic principle is seen to be that where there is the intentional infliction of damage, it will be actionable unless justified.<sup>59</sup>

In American jurisprudence, the idea of the prima facie tort is that anyone who intends to cause harm is prima facie liable for it. "Intent", as used in this sense, means that there exists a substantial certainty that harm would result.<sup>60</sup> Principally concerned with economic interests such as the interference with contract, (and this would cover situations such as application for jobs) the American effort has been applauded in some quarters as having "the potential for providing a broad tort principle that could accommodate a variety of situations that legitimately call for legal support and yet do not fit into any of recognized economic torts."<sup>61</sup>

Only one commonwealth case has tried something analogous to the prima facie tort. In Australian case of Beauresert v. Smith, the court maintained

independent of trespass, negligence or nuisance, but by an action for damages upon the case, a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another is entitled to recover damages from that other. (emphasis added)<sup>62</sup>

This was seen as an ostensibly broad statement of liability, causing considerable consternation among both academics and the courts of the commonwealth, in that it was seen to countenance liability to an indeterminate class of persons only incidentally affected by the unlawful action. This resulted from the fact that the terms "unlawful", "intentional" and "positive acts" were seen as open to a variety of interpretations.<sup>63</sup> Some

felt this vagueness would throw the reasonably well-established boundaries of many torts into confusion, the consequence of which would be that the whole structure of torts might collapse.<sup>64</sup>

To date, Canadian courts have not gone so far as to suggest that there might be a general principle of a peoples' right to be free from all harm.<sup>65</sup> Instead, the Canadian view has been that the person must show why existing principles of liability should be extended to cover her situation (that is, she must identify the nature of the right she invokes) and the person must justify the right's protection.<sup>66</sup>

Arguably, the justification for protection of human rights by the courts would not be a difficult hurdle, particularly in the area of discrimination. Arguments based on peace and security of the community and situated in principles of democracy create that justification. These recognize that to effectively exercise democratic rights the preconditions of non-discrimination must exist. These also recognize the potential for harm to the community where protection is not offered.

The requirement of showing why existing principles of liability may properly be extended to cover a plaintiff's situation typically would be met by either showing that the right to be acknowledged is similar to the main stream of tort law or by demonstrating that the demands of justice and equity require a new cause of action. This may be accomplished by stressing that one of the most basic requisites of justice demands that the person has a right to an effective remedy. By

showing that no substantively effective statutory remedy existed, justice requires the common law fill that lacuna.

#### 4. Beyond Physical Harm: The Expansion to include Emotional and Psychological Damage

While torts typically handled personal and property damage, the courts also have come to recognize that other types of damage can result. In 1897 the court in Wilkinson v. Downton<sup>67</sup> accepted emotional harm as an actionable injury. The ratio decidendi set out "that if a person wilfully does an act 'calculated' to cause harm to another and thereby infringes his legal right to personal safety, and in consequence causes physical harm, including mental distress, a cause of action arises in the absence of lawful justification." (emphasis added)<sup>68</sup> At the time, in part because the courts feared that mental injury or shock was easy to over-estimate or fake, the case was seen as limited to its own peculiar facts (in effect tying the mental damage to a physical consequence of illness). It was, however, an early step towards respecting the psychological security of the person. Since then, by reference to modern cases dealing with remoteness of damage<sup>69</sup> it may now be possible to argue that as long as mental suffering is the kind of injury that was reasonably foreseeable by the defendant, it therefore will be an actionable kind of damage.<sup>70</sup>

In comparison, the American response to damages for mental distress has been broader than our own to date. The Americans have given recovery for mental distress, in an action

separate from wrongful dismissal, where a white in the process of firing a black called him "a goddam nigger".<sup>71</sup> In another instance the plaintiff recovered damages when called "a fucking spic ", "a fucking Mexican greaser" and "nothing but a pile of shit" by the county Commissioner.<sup>72</sup> These types of actions seem to speak to an objective mental injury, that is to say that a reasonable person would assume a psychological damage would be flowing from the action of the defendant. While the dignity of the person is protected by these American cases, it is in a restricted sense of having caused mental distress. To that extent it still remains short of viewing the actions as abrogations of one's inherent dignity. Our Canadian approach has been to award aggravated damages, which of course, have an emotional or psychological aspect. These damages to date, however, flow only out of some other cause of action, for example, battery.

#### D. Expansion in Other Areas: Motherwell v. Motherwell <sup>73</sup>

Our Courts and law in general, have an obligation to protect those who for whatever reason cannot themselves [because in] a very real sense the law belongs to the people... <sup>74</sup>

Negligence is not the only area of tort law to demonstrate expansion and adaptation to new problems or circumstances. In Alberta there was no legislatively mandated law of privacy and

in Motherwell the court had to consider whether common law principles could be seen as including this right .

In Motherwell the defendant, suffering a paranoid condition, harrassed the plaintiffs by repeatedly calling them as often as 60 times in a day. The plaintiffs brought action for invasion of privacy and nuisance, asking for an injunction and nominal damages.

In finding for the plaintiff, the court refused to be tied to the traditional categories of nuisance. The court explained that it was not only negligence that could offer redress for the interests of justice. Instead, it was stated that the courts have consistently demonstrated that common law principles can be adopted to serve the changing and expanding needs of society: "Courts do have the power, and must exercise the power, of adapting the common law to the facts of the day."<sup>75</sup>

In Motherwell, Appeal Judge Clement pointed out that "categories" may be expanded by reference to "principles" ( " a general concept of legal rights and duties in an aspect of human activities in which some common element is to be found").<sup>76</sup> By "categories", Clement meant "the application of a principle to a particular circumstance, discernible in precedents, which have been found to come within the principle":

When the circumstances of a case do not appear to bring it fairly within the concept of a principle that consideration of a new category is warranted. The scope of a category may in time be broadened by a trend in precedents which reflect judicial considerations going beyond the disciplines of stare decisis. Those same

considerations , arising from adequately demonstrated social need of a continuing nature, may lead when necessary to maintain social justice, to a new category or the review of a principle. 77

In many respects the judicial reasoning of Motherwell was not dramatic activism. It was, however, a principled decision that bodes well for future decision-making in human rights decisions.

Concomitantly, the courts, from time to time, have also recognized that in terms of providing real "remedies", vindication in principle alone may not be sufficient. It has been pointed out that plaintiffs must have access to the forum of their choice without fear that even though vindicated in principle they will suffer financially.<sup>78</sup> Consequently, some of the "human rights" cases in other jurisdictions have striven to ensure that claimants are not penalized by legal costs incurred in the enforcement of their rights.<sup>79</sup>

#### E. The Interplay of Tort Law and Statutes

As noted in Chapter 3, all Canadian jurisdictions presently have human rights statutes of one form or another in place, which raises questions of how tort law might coincide, and not conflict, with these legislations. Over the last few decades the courts have been trying to work out in general terms the complexities of the interaction of tort law with statutory law, a task that has yielded mixed results in regards to human rights issues.



### 1. Saskatchewan Wheat Pool

In Saskatchewan Wheat Pool v. Can.<sup>80</sup> the Supreme Court of Canada considered whether a breach of a statutory provision was sufficient in itself to give rise to liability, without proof of negligence. The Court stated that although there could not be a tort of negligence based directly on a breach of a statutory duty, rules established by the law could be evidence of a duty and failure to live up to it could be negligence of that duty. This proposition opens up the possibility of tort action where an actor has failed, neglected or ignored the duties established by human rights acts.

Admittedly, the Supreme Court in Saskatchewan Wheat Pool deprecated attempts to look for legislative intent when considering whether or not to permit rights of action. Justice Dickson in dicta went so far as to suggest that liability cannot be created by a statute where there is no express provision for it.<sup>81</sup>

However, in later cases, the fact that a statute covered some of the same ground as a recognized tort was not seen as necessarily totally precluding civil liability. In Baird v. R in Right of Canada, the Federal Court of Appeal stressed that whether there was to be civil liability in a particular context required reference to the common law principles governing liability. Those principles look to such concepts as the proximity of the parties and remoteness of damage. Where one meets those first principles, civil liability can and probably should be waiting. This is an important concession, because it

will later be shown that, in the area of non-discrimination, both concepts are fairly easily met.<sup>82</sup>

## 2. Omission of Statutory Duties

Outside the area of negligence, there have been numerous other instances in tort law that have worked towards an extension of liability. One direction of expansion that has been noted of the Canadian courts is a growing potential for tort liability for omission prompted by specified statutory duties.<sup>83</sup> As background, commission (misfeasance) has typically been seen as the "active misconduct working positive injury to others"<sup>84</sup> and omission (non-feasance) has been viewed as "passive inaction failing merely to take positive steps to benefit others to protect them from some impending harm."<sup>85</sup> While, historically, there had been a reticence to attribute liability in instances of non-feasance (partly out of legal issues of remoteness and partly out of a philosophy of individualism, wherein to assist others was seen as more properly a matter of individual morality),<sup>86</sup> today a heightened sense of social obligation and other "collectivist tendencies" have eroded the distinction between the two.<sup>87</sup> A borderline between the active misconduct and passive inaction, which has never been easy to draw, has become ever increasingly blurred, with liability being found more frequently for personal failures to act.

a. Outside of Personal Omissions

In contrast to omissions for personal acts, certain relations involving control over the conduct of third parties seem to have always required "special assurances of safety in accordance with prevailing assumptions of social responsibility." <sup>88</sup> In each case there seems to be operating either a "special relation between the defendant and the injured person who is entitled to rely upon him for protection" or a special relation "between the defendant and the third party who is subject to the former's control".<sup>89</sup> While typically we see these as occurring in circumstances of occupier and visitor, employer and employee, or innkeeper and guest, either alternative could also apply to the relationship between public authorities and their constituents. Using this approach, individuals are to be protected and third parties are supposed to be subject to the public authorities' control.

Until quite recently, courts were cautious about finding liability for omission by public authorities. The courts drew a distinction between positive injury caused by active exercise of powers and a mere failure to exercise the powers adequately or at all.<sup>90</sup> Liability would only be found in instances where there had been an active exercise of power. Twelve years ago, in Anns v. Merton London Borough Council<sup>91</sup> there was a substantial shift from that approach, expanding tortious liability of public authorities.

b. Anns v. Merton London Borough Council

Anns involved a local authority, which, in contravention of the statute governing it and in contravention of its own by-laws, either failed to inspect (omission) or negligently inspected (negligence) the foundations of a new building. As a result, the building suffered structural movements, jeopardizing the safety of anyone who entered the building.

The court had to consider whether they could hold the local authority tortiously responsible for having failed to carry out either a statutory or common law duty. In Anns, the court saw that the local authority was to control the activities of builders. The local authority's duty was to assure that breaches of by-laws did not occur and this duty was owed to those whose health and safety might be jeopardized by such violations.<sup>92</sup>

In the course of its analysis, the court drew a distinction between the operational and the policy-making aspects of a public authority's discretion. The court concluded that, while it always was up to the body to decide what was the best financial allotment of resources, once committed to that course a body had a duty to the public to carry through with the duties that had been set. In Anns the authority failed in its public duty to live up to the operations framework it itself had established.

In the circumstances of Anns, the court noted it was sufficient that, by exercising their power properly, the

defendant public authority could have prevented the harm. Having not done so established a prima facie duty which was not negated by any countervailing policy.

### c. The Significance of Anns to Human Rights Protections

For the purposes of this paper, Anns<sup>93</sup> is relevant in that it establishes at least two paradigms- one in respect of the duty owed by government officials in the operation of human rights commissions and the second in respect of the duty owed by private individuals under the human rights acts.

Since then, courts have followed Anns as a precedent somewhat timorously. For one thing, it has been noted that the ratio of the case could only be invoked if the empowering statute has as its object the protection of someone like the plaintiff against the contemplated risk.<sup>94</sup> A failure of public authorities to live up to the mandate of human rights statutes conceivably could meet that criterion.

Arguably using the reasoning of Anns, bureaucrats are not only under a duty to see that the human rights acts are complied with and to assure that their staff members fulfil their statutory obligations, they also have a responsibility to control such matters as the timing of process in such a way the court will not later throw the case out because of excessive delays. Failure to do so may lead to liability in negligence.

However, it is important to keep in mind that going after the officials is not only a limited solution, it is a circuitous

route to tackling human rights problems. What one really wants to stop is the discriminatory behaviour of individuals or corporate bodies, not restrict the power of those seeking to protect the weak.

#### d. Anns and the Private Actor

Anns also detailed an approach to new potential actions covering the duty of private individuals, looking to the kind of damage and kind of duty involved. In essence, Anns reduces to a two step test: 1) is there a general proximity between the parties to this action and 2) are there policy reasons for limiting that presumed duty.<sup>95</sup>

Applying this approach to human rights legislation, the damage to be avoided by human rights acts is, of course, disparagement of dignity of the person. Such disapprobation might be accomplished in any number of ways- through words, actions, failure to take into account the other's needs or desires, failure to consider the other on a basis of equality. The duty of the individual is to not act in such a way that there is such damage to the dignity of the other.

Where this loss of dignity has occurred, prima facie there would not be a reason the duty should not apply, unless it could be framed as a policy argument. Possible policy arguments would include: 1) the traditional worry that the floodgates to civil litigation would be opened, 2) a belief in the difficulty in establishing the range of persons affected, or 3) a concern over fitting the case into the existing conceptual structure of torts.

The floodgates argument must be acknowledged. However, an overly cautious reaction to the mere potential of "floodgates" can cause an undue restriction on the access to justice and an unwarranted fettering of just and equitable remedies for victims. Those floodgates assumptions would likely be correct only if the categories are left wide open or if the conceptual structure of torts could not be kept intact. The extent to which human rights torts parallel the provisions of human rights legislation (or otherwise parallel basic non-discrimination concepts of "sufficient connection"), the potential for wide open categories decreases. Similarly, any detrimental effect on the conceptual structure of torts will be minimized. Human rights acts exemplify categories of people to be covered. They also establish situations in which discrimination is neither a legitimate exercise of freedom of choice nor a reasonable standard of behaviour (such as within the employment process or in accommodation). Even as one moves beyond the confines of statutes already in place, looking to international concepts of non-discrimination, reliance on first principles still provides the necessary coherency desired.<sup>96</sup>

#### e. The Movement Towards Concurrent Liability

Thirty years ago, tort law would have been perceived as a concept totally distinct from all other forms of legal relations.<sup>97</sup> Yet today the court has asked the question: "Does the existence

of one kind of legal relationship necessarily exclude tort liability?" and it has answered the question in the negative.

The courts have stressed that a common law duty of care is created by certain kinds of relationships, whether or not the relationship simultaneously exists in some other arena.<sup>98</sup> Importance instead is placed on the proximity of the parties; with the proper question being whether there was a relationship of sufficient proximity, not how it arose.

It has been felt that if the facts disclose the self-same duty arising in more than one type of legal relationship and there is a breach of that duty then the plaintiff can sue under the legal relationship that he feels is best for him.<sup>99</sup> Typically, this is framed within a contract/tort context and the existence of a contractual duty of care has been seen as not precluding a parallel claim in tort. Similarly, it may be argued that the existence of the statutory duty under human rights legislation should not preclude another common law duty- simply, what is important is the proximity of the parties and the existence of the duty.

#### F. Tort Law As a Political Tool

It has been suggested in some circles, that tort law, itself, can be used as an instrument of social pressure upon the centres of government, financial and intellectual power.<sup>100</sup> It has been explained that " [a] tort suit can challenge the decision-making power of the omnipotent and omnipresent managers of modern society. In a world increasingly dominated



by distant, elite decision-makers, this watchdog role is becoming more and more necessary."<sup>101</sup> From this view, tort law can exert its pressure not only through financial damages, but also through the adverse publicity that may follow a particular incident when a lawsuit is involved. For those who feel that community standards are higher than the legislated protections and for those who feel that the hard-gained advances made are easily open to erosion or legislative reversal, the suggestion has appeal.

The use of the publicity is purported to have at least three effects. It can cost the defendant money far in excess of any damage award. If the defendant is a company it can cause the diminution in the value of corporate shares. Secondly, it can bring about a loss in prestige and can tarnish a defendant's reputation, both of which take money, time and effort to restore.<sup>102</sup> Thirdly, harmful publicity may induce government intervention in that politicians may be forced to enact new legislation to control the perceived abuse.<sup>103</sup>

One perceived limitation of this, however, is that there is no way of assuring that a tort suit will receive any media attention at all. Argument can be made that media has its own agenda in selecting which events to cover. Coverage, if it does occur, is often sporadic and may emphasize different elements of the case or situation than those elements which are important from the plaintiff's point of view.

Additionally it has been argued that the public may not think the challenged conduct is very reprehensible and public

officials may not be spurred to action. Defendants may also be able to withstand the effects of such bad publicity by launching a counter- campaign.<sup>104</sup> Even worse, the existence of the tort action may lull the legislatures into inaction, seeing the civil remedy as having already handled the matter.

Despite these possibilities, tort law as ombudsman has been considered to have a significant advantage - the lawsuit and its attendant publicity sanction are in the hands of the ordinary citizen. As one writer noted:

It is both triggered by ordinary citizens and imposed by them. Thus anyone who feels injured by someone else may institute civil proceedings. He does not have to wait for some prosecutor or civil servant to take up his cause. Too often such public servants are reluctant to move. They may have limited resources at their command. Politics may be involved. An aggrieved individual, however, labours under no such burden; he can unilaterally commence proceedings at any time, even if his case is by no means iron clad."<sup>105</sup>

Admittedly, there are times when the common law falls behind the times. Yet, even where the common law lags behind the popular will, it has been noted law remains an instrument of change:

Paradoxically, the rigidity of the common law sometimes fosters law reform, rather than impedes it. A harsh decision in a well- publicized test case can spur legislative reform, whereas a decision that corresponds with the public's sense of justice may submerge what may be a rather unsatisfactory state of law in a particular area. 106

This is precisely what happened in Ontario around 1948-50. In Re Noble and Wolfe <sup>107</sup> the judiciary upheld a restrictive

covenant that would have prevented the sale of land to anyone but whites. In doing so the judiciary refused to follow the earlier decision in Re Drummond Wren.<sup>108</sup> The decision in Re Noble "stirred public reaction, aroused the press and brought pressure groups to the doorstep of the government...".<sup>109</sup> The response was swift: "[i]n March, 1950 the Ontario Legislature unanimously passed The Conveyancing and Law of Property Amendment Act which declared covenants in deeds of land with restrictions on race, religion or ancestry be void."<sup>110</sup>

A.M. Linden the person who first offered the idea of tort law as ombudsman, acknowledged the economics of tort litigation limits the power of tort law to act in this role. "Unless there is a good chance of winning a substantial award, it is unlikely that civil litigation will be undertaken and if a sensible settlement is made, that will probably be taken rather than proceeding to trial."<sup>111</sup> To overcome this limitation, Linden suggested the use of the contingency fees. Other writers, using mathematical models, have stressed the role of punitive damages, seeing these as decreasing the ratio of award in relation to expenditure and creating as a disincentive for employers to discriminate.<sup>112</sup>

### G. The Educative Ability of Torts

Closely aligned with tort laws' watchdog power is its perceived educative ability.<sup>113</sup> Certainly positive results have been seen recently in areas such as social host liability.<sup>114</sup> In the medical malpractice field it has been acknowledged that the

overall consequence of the threat of litigation in the area has been one of fostering a higher quality of health care, putting pressure on doctors to live up to specific standards of conduct.<sup>115</sup> It is believed tort law could similarly help in the private spheres of the human rights field. At this point it might be advisable to more closely examine how tort law has fared when it has been involved in the protection of human rights.

## CHAPTER 5 FOOTNOTES

1 For medical experimentation without consent as battery see Halushka v. University of Sask. (1965), 52 W.W.R. 608, 52 D.L.R. (2d) 436 (Sask. C.A.).

2 Civil Conspiracy:

Mogul S.S. Co v. McGregor Gow & Co., [1892] A.C. 25 (H.L.); Quinn v. Leatham, [1901] A.C. 495 (H.L.); Hand Woven Harris Tweed v. Veitch, [1942] A.C. 435; Hunter v. Thornton, [1957] 1 All E.R. 234, [1957] W.L.R. 321.

3 J.P.S. McLaren "The common law nuisance actions and the environmental battle- well tempered swords or broken reeds?" (1972), Osgoode Hall L. J. 505 at 511-16.

4 W. Malone, "Genesis of Wrongful Death" (1965), 17 Stan. Law Rev. 1043.

5 E.g. libel rules in privacy where as long as one is telling the truth about some long past event which nevertheless hurts the person's reputation and unblemished present, the actions will not constitute libel.

See Moysa v. Alberta Labour Relations Board, [1989] 1 S.C.R. 1572.

Human rights tribunals are not bound by principles developed in the area of wrongful dismissal when awarding compensation to victims so that the appropriate test to place the victim in the position he or she would have been in had the discrimination not occurred and should not be limited by considerations relating to "reasonable notice" of dismissal.

6 Although this may have been for procedural reasons rather than philosophical or political ones - the action had to be initiated by the party harmed which could not be done if the party was dead.- W. S. Malone, *supra* n. 4 at 1043.

7 K. Cooper-Stephenson, Tort II Casebook, College of Law, University of Saskatchewan, 1988) [unpublished] p. 1.

8 *Ibid.*, p. 2-3.

9 D. Lockhard, "The Politics of Antidiscrimination Legislation" (1965/6), 3 Harv. J. on Leg. 3- The words "badly distributed" is in reference to ghettoization.

10 Admittedly, there may be drawbacks to this. Even under a tort heading, where the action is against a municipal actor may now fall under the typical limitation of 60 days.

11 I. Hunter, " The Stillborn Tort of Discrimination" (1978), 14 Ott. Law Rev. 219 at 225. Another possibility might be to award costs if the person is successful.

12 However, in many senses the person still is not in control in the civil action either. It is placed in the hands of lawyers, judges, and respondents who develop their own sense of priorities, time frames. Actions become sidetracked on notice of motions often having little to do with the substance of the case.

13 Cameron v. Nel- Gor Castle Nursing Home ( 1984), 5 C.H.R.R. D/2170 ( Ont. Bd. of Inquiry); Tabar v. Scott (1982), 3 C.H.R.R. D/1073 ( Ont. Bd. of Inquiry), reversed in part(1988), 9 C.H.R.R. D/ 4537.

14 Comm. des Droits de la Personne c. Hopital Rivieres - des- Prairies ( 1986), 7 C.H.R.R. D/3615 (C.S.Que ).

For a different view see Alta Human Rights Commission v. Alta Blue Cross Plan, [ 1983] 6 W.W.R. 758, 28 Alta. L.R. ( 2d) 1, 4 C.H.R.R. D/1161 ( Alta. Q.B.).

15 L.C.B.O. v. Karumanchiri ( 1988), 19 C.C.E.L. 172 (Ont.S.C.).

16 However, what may be operating is the thought that if costs are given for complainants, they can also be given for respondents. Consequently, both parties will tend to use lawyers more often.

17 Probably one of the more outstanding cases outlining the disadvantage to an ultimately successful claimant was Robichaud v. Treasury Board. See the comment in "Review Tribunal rejects Robichaud arguments against lid on damage payments", (1990) Can. Hum. Rights Advoc. (Jan.), p. 6.

18 J. Bankier, " The Future of Class Actions " (1984), 9 Can Bus. L.J. 260 at 261.

19 Ibid. at 269-70 and at 273. The problem in Canada has been that in many cases there may not be a correspondence between the feasibility of 'aggregate assessment' of damages and the size or merit of class members claims. The Supreme Court of Canada in Naken v. General Motors rejected class actions like Naken where individual assessments were be essential.

20 Ibid. at 269.

21 In B. C. Human Rights Coalition v. B.C. ( Ministry of Human Resources) ( 1987), 8 C.H.R.R. D/ 4275 (B.C.H.R. Council) the government tried arguing that this case under the old Code, could not go for a class action. The Council said no, there was no provision in the Code prohibiting it and the Code contemplated the rights of classes.

The case noted that Saskatchewan, Quebec and New Brunswick all have found no class actions. For Saskatchewan the case is Huck v. Canadian Odeon Theatre (1981), 2 C.H.R.R. D/ 351.

Ontario in Tabar v. Scott and West End Construction found there was the possibility. ( 1982), 3 C.H.R.R. D/ 1073.

22 That federal case for pay equity was a negotiated agreement. Class actions of course have their own drawbacks as to who pays and who is included.

23 J.G. Fleming, Law of Torts (7th ed.) (Carswell: Agincourt, 1987) at 568.

24 Brown v. Waterloo Regional Board of Commissioners of Police (1982), 37 O.R. (2d) 277 .

25 An example of where a racially motivated attack netted aggravated damages was Pereira v. Hanson [1986] B.C.D. Civ. 3385-15 where the complainant received \$2000 non-pecuniary for the indignity and humiliation. The fact that the defendant had been convicted did not disentitle the plaintiff to his damages. See also Amos v. Vawter et al (1969) 69 W.W.R. 596 at 602; Storries v. Newman (1982) 39 B.C.L.R.376 at 390.

26 See "\$1000 for 'community disgrace' awarded to B.C. Sikh." in Lawyers Weekly, March 24, 1989, p. 9

In this B.C. County Court decision the plaintiff was awarded \$100,000 for injuries suffered, \$4500 punitive damages and \$1000 for disgrace in the eyes of his community.

27 Nantel v. Parisien (1981), 18 C.C.L.T. 79 ( Ont. H.C.).

28 Lord Devlin, Rookes v. Barnard, [1964] A.C.112 .

29 Fleming, *supra* n. 23.

30 G.H.L. Fridman "Punitive Damages in Tort" ( 1970) 48 Can. Bar Rev. 373 at 400.

31 K.D. Cooper-Stephenson and I.B.Saunders , Personal Injury Damages in Canada ( Toronto: Carswell , 1981) at 686-87.

32 Waddams' counter-argument to such a position though is that this can be achieved by costs ( at § 985). S.M. Waddams The Law of Damages, (Toronto: Canada Law Book, 1983). Part of the problem with Waddam's suggestion is what is meant by "costs". When a court awards " costs" it typically is on a party-party basis and , as such , constitutes only partial indemnification of the real legal costs encountered in the case.

33 Rookes v. Barnard ,[ 1964] A.C. 1129, [1964] 1 All E.R. 367.  
reference will be to 1 All E.R. version.

34 Ibid. at 411.

35 Ibid.

36 Broome v. Cassell , [1972] A.C. 1027 ( H.L.).

37 Lord Hailsham at 1078, in Broome v. Cassell.

38 In order to speculate that the plaintiff will not sue, that is, in order to make that calculation the defendant has to in some way identify the group.

39 Lord Devlin, supra n.33 at 410.

40 In the contractual arena these abuses are typically labelled as duress, undue influence , oppression or unconscionability. In tort law the rubric often used is what "the reasonable man" would do or think and appeal is made to community standards. In the law of trusts, the the abuse of power is even further removed from any sense of criminal type of illegality- there power must be applied with impartiality and even-handedness.

41 See G.H.L. Fridman , "Punitive Damages in Tort" (1970), 48 Can. Bar Rev. 373.

42 Waddams, supra n.30 at § 981 mentions these arguments, but then discounts them.

43 Some of the cases where it has been given are:  
Holowaty v. Ford Motor Credit Co. of Canada ,[1974] 1 W.W.R. 225 ;  
Paragon Properties v. Magna Envestments Ltd (1972), 24 D.L.R. (3d) 156; Turnbull v. Calgary Power (1974), 51 D.L.R. (3d) 562; Gouzenko v. Lefoli (1967), 63 D.L.R. (2d) 217; Fraser v. Wilson (1969), 6 D.L.R. (3d) 531.

44 It has been given for negligence, where it almost reaches the level of recklessness. The typical example here is the person recklessly shooting into a crowd but does not injury anyone. The situation for contract breaches is usually justified in terms of efficiency of breaches, also that not within the contemplation of the parties.

45 It has been allowed for wrongful eviction or harassment of tenant-see Drane v. Evangelon ,[1978] 1 W.L.R. 455; Parles v. Howard Johnson Restaurants Ltd (1970), 74 W.W.R. 255 ; Tefft v. Kooiman (1978), 87 D.L.R. (3d) 740; Ozmond v. Young (1980), 109 D.L.R. (3d) 304; Nantel v. Parisien (1981) 18 C.C.L.T. 79.



Also, the existence of a contract alone may not be determinative of the matter, if the action can be characterized also as tort. See section on concurrence of contract and tort.

46 K. Cooper-Stephenson and I.B. Saunders, *supra* n. 31 at 691.

47 Waddams, *supra* n. 32 § 1006.

48 Constantine v. Imperial Hotels [1944] K.B. 693.

49 Fridman, *supra* n.41 at 377.

50 Can Alta Carriers Ltd. v. Ford Motor Credit Co. of Canada Ltd. (1975), 49 DLR (3d) (Alta C.A.) notes:

As to punitive damages, the principle... is that they may be awarded when the actionable injury is 'done in such a manner that it offends the ordinary standards of morality or decent conduct in the community in such a marked degree that censure by the way of damages is, in the opinion of the court, warranted.'

51 A.M. Linden, "The Good Neighbour on Trial: A Fountain of Sparkling Wisdom" (1983), 17 U.B.C.L. Rev. 59.

52 (M'Alister or) Donaghue v. Stevenson . [1932] A.C. 562 (H.L.).

53 *Ibid.*, Lord Atkin.

54 The question becomes which community we have regard to - the manufacturing community, North American community, or the rest of the world. Consider for example the tendency to dump products no longer acceptable to North American markets in third world countries or the expansion of markets with products not suited to the physical situation such as selling baby formula to areas where there is no clean water or where it will be diluted to the point the infant's health is placed in jeopardy .

55 Undoubtedly, there will be questions of how narrowly to define "community" , and for that reason reference should be made to Milne, *supra* , Chapter 2.

56 G.Williams, "The Foundation of Tortious Liability" (1939) 7 Cambridge L. J. 111 referring to Lord Salmond's view of the argument.

57 *Ibid.* at 114 .

- 58 Ibid., but in the view of Pollock, the outstanding merit of the general theory is its insistence upon the fact that tort law is neither fragmentary or static.
- 59 Fleming, *supra* n. 23 at 18:28.
- 60 Dobbs, p. 878.
- 61 P. Burns, "Tort Injury to Economic Interests- Some Facets of Legal Response " (1980), 58 Can. Bar Rev. 103. Also C.A. Linden, A.M.Wright,& L.N. Klar (eds.) Canadian Tort Law (Toronto: Butterworth, 1985 ) at 18:29 seem to question that assessment of the prima facie tort though.
- 62 Gerald Dworkin and Abraham Harari, "The Beaudesert Decision- Raising the Ghost of the Action on the Case, Part II (1967) 40 Austr. L.J. 347.
- 63 "Unlawful" could have meant tortious, criminal, in breach of a statute or in breach of a contract.
- 64 Dworkin, *supra* n. 62 at 348.
- 65 Frame v. Smith [1987] 2 S.C.R. 99.
- 66 Ibid. at 121.
- 67 Wilkinson v. Downton ,[1897] 2 Q.B. 57, 66 L.J. Q.B. 493; 13 T.L.R. 388; 76 L.J. 493.
- 68 Fleming, *supra* n. 23 at 30.
- 69 Specifically, Wagon Mound (No. I), [1961] A.C 388; [1961] 1 All E.R. 404 (P.C.).
- 70 H. J. Glasbeek, "Outraged Dignity- do we need a new tort?" (1968), 6 Alta. Law Rev. 77 at 93. He refers to Bourhill v. Young, [1943] A.C. 92 per Macmillan at 103 as well.
- 71 In Dobbs book, p. 55 : Alcorn v. Anbro Engineering Inc, 2 Cal. 3d 493, 86 Cal Rptr. 88, 468 P. 2d 216 (1970).
- 72 Gomez v. Hug, 7 Kansas App. 2d 603, 645 P. 2d 916 (1982) .
- 73 Motherwell v. Motherwell ,[ 1976] 6 W.W.R. 550 (Alta. C.A.).
- 74 Krouse v. Chrysler Canada et al. , [1970] 3 O.R. 135, 12 D.L.R. (3d) 463, 1 C.P.R. (2d) 218 , at 154 of O.R. version.

- 75 Ibid. at p. 140 of O.R. version.
- 76 Motherwell, supra n.73 at 559.
- 77 Ibid. at 69-70.
- 78 Ibid.
- 79 See Krouse, supra n. 74; also Saccone v. Orr (1981), 34 O.R. (2d) 317.
- 80 R. in right of Canada v. Saskatchewan Wheat Pool [1983] 1 S.C.R. 205, 143 D.L.R. (3d) 9.
- 81 See Le Dain's comments on this in Baird v. R. in Right of Canada, (1983), 148 D.L.R. (3d) 1, 48 N.R. 276( Fed. C.A.).
- 82 Infra, Chapter 8.
- 83 K. Cooper-Stephenson, supra n. 7 at 4.
- 84 Fleming, supra n.23 at 134.
- 85 Ibid.
- 86 Ibid. It was seen as involving a more serious restraint of individual liberty to require a person act than to place limits on that freedom. Also it was perceived that the plaintiff's loss was different in both cases- whereas for the commission of an act the defendant created the risk, for an omission the defendant merely benefited by not interfering in the affairs of the other.
- 87 Fleming, supra, n. 23.
- 88 E.g. innkeeper to protect the guest from other guests see Fleming, ibid. at 139.
- 89 Fleming, ibid.
- 90 Ibid. at 141.
- 91 Anns v. Merton London Borough Council [1978] A.C. 728.
- 92 Anns has been applied in Canada. See Kamloops v. Nielsen, [1984] 5 W.W.R. 1, 54 N.R. 1, 29 C.C.L.T. 97.
- 93 See also Dorset Yacht v. Home Office [ 1973] 2 All E.R. 294 ( H.L.) on which it partially based.

- 94 Fleming, *supra* n. 23 at 142.
- 95 Anns, *supra* n.91 at 741.
- 96 *Supra*, Chapter 2.
- 97 *Supra* n. 7- Central Trust v. Rafuse , [1986] 2 S.C.R. 147 notes the attempt in the 19th century to create a barrier between tort and contract. This was seen as contrary to the spirit of the common law which allowed various forms of actions to be used in respect of the same facts. "This was one of its instruments of growth. So too was the tendency to add categories that fell within a form of action." La Forest in John Maryon v. N.B. Telephone (1982), 43 N.B.R.(2d) 469.
- 98 E.g. see Wilson, J.A. dissent in Dominion Chain v. Eastern Construction (1974), 2 O.R. (2d) 481.
- 99 Photo Production v. Securicor, [ 1978] 1 W.L.R. 856, at 862 , [1978] 3 All E.R. 146 ( Denning).
- 100 A.M. Linden, "Tort Law as Ombudsmen " (1973), 51 Can. Bar Rev. 155 at 159.
- 101 *Ibid.* at 157.
- 102 *Ibid.*
- 103 *Ibid.* at 158.
- 104 *Ibid.*
- 105 *Ibid.*
- 106 *Ibid.* at 161.
- 107 Noble v. Wolfe and Alley, [1948] 4 D.L.R. 123 affirmed [1949] 4 D.L.R. 375 ( C.A.).
- 108 Re Drummond Wren , [1945] O.R. 778.
- 109 A. Bruner, " The Genesis of Ontario's Human Rights Legislation" ( 1979 ), 37 U.T. Fac. L. Rev. 236 at 246.
- 110 *Ibid.*
- 111 Linden, *supra* n. 100 at 166.

112 J. Maddon and J. Wissinki, "Achieving Title VII Objective at Minimum Social Costs : Optimal Remedies and Awards" (1984-5), 37 Rutgers 378.

113 Some may suggest that the educative ability of tort law may be overstated. Linden, Wright, & Klar supra n. 61 at 4:62 note this possibility in regard to consent and doctor's professional negligence.

Research on the case of Reibl v. Hughes [1980] 880, 114 D.L.R. (3d) 1, 33 N.R. 361, 14 C.C.L.T. 1 found that the Supreme Court decision did change the attitude of 15% of the Canadian doctors towards informing their patient of risks. However, apparently on 85% on whom it had no effect.

Admittedly, research of efficacy in the area of effectiveness of court decisions in creating change has been sparse. However, it has been shown in the area of medical malpractice actions torts have served a useful role because of the sting of publicity. There have been significant changes in hospital standards and procedures, this in spite of the fact that doctors do not pay the awards personally. Positive results have been accomplished in altering the behavior of both hotels and social hosts, making them responsible where guests or patrons suffered or caused injury after leaving premises where liquor was served.

114 Jordan House v. Menow (1973), 38 D.L.R. (3d) 105 (S.C.C.).

115 This is noted in the article "Malpractice" written by L.E. & F.A. Rozovsky in the magazine "Physicians Management Manuals", August, 1989. The comment is attributed Prof. Pritchard, Dean of Faculty of Law, U. of T.

CHAPTER 6:  
THE DEVELOPMENT OF TORTS  
IN THE PROTECTION OF HUMAN RIGHTS  
PART II

I. Introduction

While Chapter 5 pointed out the theoretical advantages of tort law in the protection of human rights, this chapter examines actual situations in which legislatures have recognized that potential for progress. From time to time, legislatures have enacted legislation specifically delving into the human rights areas and utilizing civil action. To should be noted at the outset that certain deficiencies have become apparent. Nevertheless, by having an understanding of the difficulties encountered in these areas, hopefully, one can then proceed to construct new torts that could avoid those same pitfalls. Although for the most part descriptive, the chapter also contains evaluative elements, setting out the criticisms made of the legislated efforts. As such, the chapter provides a guage of effectiveness of tort law in this kind of protection and highlights the areas where problems have arisen.

II. Domestic Attempts at Using Tort Law as a Protective Device

A. The Privacy Acts

Perhaps partly because privacy is considered by many as a fundamental value to our liberal culture, several jurisdictions in Canada have attempted to protect the human right to privacy.

by providing for tort action.<sup>1</sup> The reasons given for the protection are varied. For some, the requirement of privacy is based on the individual's ability to develop his individuality and creativity,<sup>2</sup> or is seen as being necessary to the creation of intimate personal relations.<sup>3</sup>

Typically, in these acts "privacy" remains undefined. Instead, the acts give some guidance as to the factors to be taken into account to determine if the defendant has invaded the plaintiff's privacy, sometimes giving a general principle followed by a list of situations which may amount to a breach of privacy.<sup>4</sup> The act will also give certain defences such as consent, public interest or fair comment, privilege, and defence of person or property, and they offer damages or injunctions.

### 1. The Results

The legislative attempts, so far, have been less than outstanding successes, having been pitted with difficulties. Criticisms of these acts fall into four broad categories: "the uncertainty and unpredictability in the application of the Acts, the heavy burden of proof on the plaintiff to prove an actionable invasion of privacy, the broad and nebulous scope of the defences and the denial of access to the lower court to litigate small claims."<sup>5</sup>

This last factor has been seen by some to be the most serious obstacle.<sup>6</sup> The court of first instance in Manitoba and Saskatchewan is the Queen's Bench, and, in British Columbia, it is the provincial Supreme Court. Reliance on "superior courts"

has been seen as severely diminishing the effectiveness of the legislation, in that litigation before higher level of courts is both expensive and time consuming. This is especially so, in light of the unpredictability of the quantum of damages.<sup>7</sup> As one writer has noted, "[l]aw reform which gives rights to individuals is a fruitless exercise, unless there is a forum for their enforcement that is practically accessible."<sup>8</sup>

For that reason, one might easily assume that any tort development in the protection of human rights should be redressable at the level of lower courts, perhaps even small claims level. As will be seen later under the section with the Quebec's Charter of Human Rights (the "Quebec Charter"), this conclusion needs to be approached with caution, though-thoroughly weighing any advantages against the disadvantages.

The unpredictability in damages comes, in part, from the fact that the court cases that probably could have offered exemplary damages, so far, have failed to do so. This is in spite of the fact that Canadian provinces have not followed Rookes v. Barnard.<sup>9</sup>

## 2. The Quebec's Experience

Although privacy acts have been legislated in several provinces, Quebec's has probably been one of the more successful. The Quebec Charter sets out the approach to privacy rights differently and, it is submitted, more effectively. As part of overall approach to provincial protection of human



rights, the Quebec Charter expressly gives a civil action for privacy and all the other rights included in the Charter.

The right to privacy in Quebec is given legislative expression in Article 5 of the Quebec Charter which provides "Every one has a right to respect for his private life." In drafting a right to privacy and inviolability of the home, it was felt that there should exist something that had already been maintained by some Quebec judges- a recourse for reparation of the moral injury caused by invasion of the privacy of the home.

It should be noted that, in Quebec, the judiciary had been responsible for the legal recognition of the right to privacy even prior to the Quebec Charter. Even though the Quebec Civil Code made no specific enunciation on the right to privacy, the right to privacy emerged as a judicial creation prior to its legislative enunciation.<sup>10</sup> In Quebec, the courts worked out the content of the right and the defences to it. Admittedly, while the civil law method differs considerably from that of the common law, it does demonstrate that one judiciary has tackled a specific type of human right question within the curial forum.

Unlike the common law jurisdictions, Quebec has no one court set aside to hear the privacy cases. Instead, the usual court procedures are followed so that injunctions, damages over \$6000, or class actions must be heard before the Superior Court. Where lower amounts are involved the cases are heard in the provincial court and, if the amount claimed is less than

\$500, in small claims court.<sup>11</sup> Small claims court, of course, avoids the costs of legal representation, while appearing to offer comparative speed and simplicity.

In some instances, compensation in Quebec has been of an apparently nominal character, but it should be noted that the level of awards in the past has been limited by the traditional rule in Quebec that punitive or exemplary damages were not permitted. However, now the Quebec Charter explicitly makes provision for exemplary damages.<sup>12</sup> In other cases, more substantial damages have been ordered.<sup>13</sup>

#### B. Defamation Act

Manitoba's 1934 amendment to the Libel Act, has been another legislated attempt to protect human rights.<sup>14</sup> The Act provides for an injunction where there has been libel against a race or creed. While the section of the Act has not received much publicity or use, it was relied upon in the 1972 case of Courchene v. Marlborough Hotel.<sup>15</sup>

In Courchene a hotel front office manager had prepared a memorandum directing the staff not to provide accommodation to natives or Metis. The Manitoba Indian Brotherhood obtained a copy of the memorandum, correctly considered it as defamatory of Indians, and sued under the Manitoba Defamation Act and under the Human Rights Act. Both pieces of legislation, at the time, provided only for injunctions.

The application was denied. According to the account given, immediately upon discovering this "policy", the president

of the hotel countermanded it. The Manitoba Trial Court and the Court of Appeal said that while the contents of the memorandum could be construed as defamatory and could constitute discrimination if it was a policy of the hotel, this was not this hotel's policy. Instead, it was considered to be the erroneous action of one person.

The case is interesting for a variety of reasons, not the least of which is how legal reasoning has changed in the last 18 years. First of all, according to the court's interpretation in Courchene, the behaviour of one staff member (even one in the position of the office manager) was not attributed to the hotel. This proposition flies in the face of doctrines such as respondeat superior and vicarious liability. It certainly would no longer hold up in light of Hinds v CEIC.<sup>16</sup>

Secondly, since the wrong-doing had ceased, it was felt there could be no injunction for discontinuance. This is a limitation inherent to injunctions, but it also underscores need for wider remedies.

Thirdly, there was dicta by the trial judge that the section was ultra vires the province, on the grounds that it dealt with criminal libel.<sup>17</sup> As mentioned earlier, this has been one of the problems plaguing the whole human rights area when dealing with legislated actions.

Fourthly, the trial judge did not find the material defamatory (or at least he felt that in the circumstances there could be seen a defence of qualified privilege).<sup>18</sup> Standing alone that kind of reasoning bodes ill for judicial activism and

for the protection of human rights by the judiciary. Still, the decision must be placed in perspective. Since the 1970's, the courts have been instrumentally involved in both human rights legislations and the Charter, and that experience offers promise for the future.

### C. British Columbia Civil Rights Protection Act<sup>19</sup>

In 1981, British Columbia passed legislation that allowed for stiff monetary penalties<sup>20</sup> and damages payable to any person, organization or society hurt by the prosecution of individuals or groups perceived to have committed racist acts. Specifically, what is prohibited under the Civil Rights Protection Act is promoting "hatred or contempt of a person or class of persons" or promoting "the superiority or inferiority of a person or class of persons in comparison with another or others on the basis of colour, race, religion, ethnic origin or place of origin."<sup>21</sup>

The practicality of the legislation has been questioned considering the high cost of litigation and the enforceability of judgments once obtained. Additionally, it has been pointed out that a racist group simply disbands and then sets up as another group, thus evading the legislation. Still, it has been suggested by race relation advocates that this kind of legislation be enacted across the country-- leaving it up to the individual to decide whether pursuing a civil action was worth the time, effort and monetary investment.<sup>22</sup>

To date only one case, Brochu v. Nelson, (which was unsuccessful) has been reported under this legislation.<sup>23</sup> However, the failure of the Brochu case seems to be more that the facts simply did not support a conclusion of racism. A French speaking plaintiff alleged that the boss was offering to others, but not to him, tasks that carried with them a higher pay scale.

On the evidence the allegation was deemed not founded. Instead, the denial of the opportunity to drive hydro vehicles which generated more pay resulted instead from certain driving incidents in which the plaintiff had been involved. Under non-discrimination principles, where there is a seemingly discriminatory result, but with no cause other than the non-discriminatory explanation, then no "discrimination" will be found. If there were two causes (e.g. poor work habits and race) leading to a seeming discriminatory result, one of which is the impugned action, then discrimination could be found.

Brochu points out two considerations. In order to have a good first case, the plaintiff must have a solid position in order to woo the judiciary and to properly educate them about what transpires in "the real world". Something out of the cracker jack box, involving a comparatively trivial problem, only reinforces any judicial predilection to assume that this kind of issue is a waste of the court's time.

The second has to do with lawyers' awareness of legislative provisions. If they don't know about it, they won't use it. Lawyers, even if aware of a statute, will demonstrate reticence

where the statute is unproven, or has not had notable success to date. They are there to win for the client and themselves, which may mean one is faced with a problem of circularity. Yet lawyers have a reasonable sensitivity to arguments that work and one good successful case will increase the probability of further use and of later successes.

#### D. Newfoundland Human Rights Code

In 1988, Newfoundland took the step of explicitly permitting "the right of any aggrieved person to initiate proceedings or to lay a complaint before a court of summary jurisdiction." <sup>24</sup> By virtue of s. 24, if one proceeds with this route, one is excluded from the Human Rights Commission avenue. As no court case under the statute has been cited by the law reports it would appear that the civil action has not been used thus far. At the same time it should be mentioned that very few commission cases ever get reported from Newfoundland either.

#### E. Attempts Based on Human Rights Acts

Because it will be discussed in far greater length in the next chapter, I will just touch lightly upon the case of Bhadauria v. Seneca College <sup>25</sup> here. In Bhadauria it was found at appeal level in Ontario that a new tort of discrimination could lay. That decision was overturned at the Supreme Court level.

However, before it was reversed, other similar actions had been brought, most notably Aziz v. Adamson.<sup>26</sup> In Aziz, the judge stressed that, where possible, it was the responsibility of the Court to co-operate with the legislature in promoting the public policy enshrined in the Code. He believed the appeal court decision in Bhadauria was an "eminently sensible one".<sup>27</sup> He noted that, while most people would proceed by way of the commission, there may be occasions where a plaintiff might prefer to proceed by civil suit. As one example, there might be instances where there was no "violation" under the act, but where nevertheless the plaintiff believed there had been and still wanted "his day in court".<sup>28</sup> There might also be occasions where the plaintiff was unhappy with a proposed settlement and was insisting on the continuation of a public inquiry. It has been suggested that if the plaintiff is unwilling to accept even a reasonable settlement, then he should pursue the matter at his own expense, not the public's.<sup>29</sup>

#### F. The Quebec Charter

Quebec's handling of privacy rights has been touched upon previously. As with privacy rights, Quebec's recognition of the possibility of human rights protection through tort action has been more comparatively longstanding than that of its common law neighbours. In 1968 the Quebec Report on Civil Rights was emphasizing that, "[i]n many instances, the most effective recourse against a governmental body, a public officer

or a private individual who infringes the liberties of another remains the civil action in damages."<sup>30</sup>

At the same time, in the Quebec Report it was felt that the Quebec civil law had already expressed a tradition in protection of individual rights, one developed through an interpretation of principles of civil responsibility and of action in damages.<sup>31</sup> The Quebec Civil Code was seen as having provided an instrument of protection in section 1053 which declared that

[e]very person capable of discerning right from wrong is responsible for the damages caused by his fault to another, whether by positive act, imprudence, neglect or want of skill. 32

The 1968 report acknowledged that while the fundamental principles had been set out by codifiers of the Civil Code of 1866, these were seen as constituting such a brief statement that the courts were obliged to develop the principles through recourse to the more general rules of civil responsibility and the provisions of the Civil Code relating to "public order and good morals".<sup>33</sup> By virtue of the extreme vagueness of those concepts, the courts needed more direction.

The Report's recommendations were intended as providing some direction as to the nature of cognizable "rights". Many, if not most, of the recommendations eventually became embodied in the Quebec Charter.<sup>34</sup> Importantly, the Quebec Charter provided for civil action and included provision for exemplary damages.<sup>35</sup>



Among the accepted recommendations was that there should be included the right to protection of dignity, honour or reputation. With regard to "the right of protection of dignity", the advisory body said that, it had no intention of creating new causes of action for dignity alone. However, it noted that, when mentioning honour and reputation, the Court decisions also contained the idea of human dignity.<sup>36</sup>

When drafting a non-discrimination article to specifically deal with contracts and public goods and services, the advisory body was interested in getting past old jurisprudence of the previous century which made the proprietor the sole judge of which customers would be served. The advisory body's recommendation utilized the approach of listing "such distinctions as." Such a direction in result would have had a list of enumerated grounds of prima facie discrimination, and an expandable ground of unenumerated grounds that might come to constitute discrimination. In the final result, the legislature went for a longer but, seemingly exhaustive, list.<sup>37</sup>

Nonetheless, it should be noted that section 50 says "[t]he Charter shall not be so interpreted as to suppress or limit the enjoyment or exercise of any human right or freedom not enumerated herein." Arguably, this could still give possible tort action for unenumerated categories outside the specific provisions of the Quebec Charter.

The Quebec setup, both before and after the Quebec Charter, has been seen by some as having potential. In part,

the allure comes from its strong contrast with common law style reasoning:

The legislation is not drafted as particular rules for particular situations. The legislation contains general principles of a high degree of abstraction. There are no definitions, no special precise rules, but instead broad flexible principles with a low degree of certainty. 38

This dynamic approach of principles as sources of law to be developed, from which to reason and analogize would seem unconventional to the common law mind. In comparison with our emphasis on precedents, under Quebec civil law, "[p]redictability, form and substance are given by the more general principles, not from the legislation but by judicial decisions in particular cases. As the case law is not binding on future courts, the predictability and certainty is supplied without imperilling the flexibility and dynamism of legislation." 39 One might suggest that if Quebec civil law decision-making was integrated in the way that corresponded with rationally defensible principles of human rights, a far stronger remedy could be offered to victims of discrimination.

### 1. An Evaluation of the Quebec Charter

To date, in Quebec the bulk of cases are still brought before the Quebec Human Rights Commission. 40 When cases have gone before the courts the Quebec Charter has met mixed success for plaintiffs. Critics can find some tempting examples

of why the courts should not be involved in this area.<sup>41</sup> C.D.P. for Leclair c. Paquet et Paquet <sup>42</sup> involved the denial of a lease to a man of social assistance. This was not seen as constituting a discrimination on the basis of "social condition".<sup>43</sup> Instead (totally erroneously, it is submitted), the court maintained the defendants were only looking for a "good tenant", "one who could pay the rent". That, of course, was precisely the kind of unthinking assumptions about social relief many hoped human rights legislation would rectify.

Further, according to the provincial court judge the fact this complainant also had epilepsy was not seen as a "handicap" in light of the fact that it was not readily visible. More worrisome was the judge's comment that by virtue of the Charter the liberty of the defendants (in particular, their right to contract) had to be preserved. That style of decision-making harkens back to a period of laissez - faire which, if it ever existed, is no longer in tune with present social, ethical or legal realities.

Complainants have had better success where the courts dealing with injunctions or with relatively settled areas of law such as agreements and covenants. There, the courts seem more willing to offer redress.<sup>44</sup> In Le Pretre c. Auberge des Gouveneurs <sup>45</sup>, for example, the issue involved the successful application for injunction to prevent dismissal from employment on the basis of racial discrimination. Gagnon c. Brassiere La Bulle Inc <sup>46</sup>, a case involving sex discrimination

and requiring an interlocutory injunction to re-instate the plaintiff, was also successful.

In Johnson c. Comm. des Affaires Sociales,<sup>47</sup> the plaintiff was seeking a writ of evocation from a S.C. decision sustaining Social Welfare from denying him welfare after having been laid off while the company was on strike. The Court was of the opinion that the Quebec Charter rendered s. 8 of the Quebec Welfare Act as inapplicable to the plaintiff. The Court has also upheld a cause of action based on "work for equal value" that was invoked under articles 19 and 87 (a) of the Quebec Charter.<sup>48</sup>

## 2. Quebec Conservatism

It should be noted that even if there is sometimes a conservatism in Quebec, it is not limited simply to the courts. Human right commissions in sponsoring cases coming before the court have been seeking quite low levels of awards (in the \$100-200 range). What is more unfortunate is that the court's response has been to award even lower than that.<sup>49</sup>

To be fair to the courts, in some cases the low award is easy to explain.<sup>50</sup> Thibault c. College de Sherbrooke, where \$1 was given, involved one of those difficult situations where an institution (and a court) feels damned no matter what it does. The school had set up a program to help women returning to school. It had hired three women to teach, but did not want to have a "work ghetto", so the fourth position was offered to a male. A female applicant with equal qualifications to the

male applicant sued. The College was ordered by the court to cease the practice, with \$1 set as damages. Arguably, no damages should have been awarded in the circumstances.

Explanations can be offered for some of the other low awards. These cases are often heard in the provincial court, which has the advantage of hearing matters quickly. However, in doing so, one runs into the obverse problem of having matters pushed through. Even to the inexperienced, it is apparent that a small claims judge has little time to reflect on the state of the law or what types of protections the legislature was trying to effect with the Quebec Charter. Because the kinds of decisions with which the judges in the lower courts have the most familiarity are proprietary interests, such as bad debts and mechanic liens, one must wonder how well human rights cases would fare. Human rights considerations are fundamentally different from the typical small claims issues. In a heavily used small claim court, the judge may not or cannot be able to take the time to leisurely consider whether there is "a reasonably sufficient connection" between the act or decision made by one party and an impugned distinction. Therefore, only the most readily apparent cases have a chance of success in this court.

### III. The Attempts by Other Fora

#### A. England's Race Relations Act :

England's human rights are basically controlled by two pieces of legislation - the Race Relations Act, 1976 and the Sex

Discrimination Act, 1975. Under the former, the Commission for Racial Equality investigates, identifies and deals with discriminatory practices in industry and institutions, through policy recommendations or sometimes through legal proceedings for injunctions.

Complaints in the employment field are covered by industrial tribunals. If an industrial tribunal hears the case, it may make an order declaring the rights of the parties, make an order requiring the respondent to pay the complainant compensation or recommend that the respondent adopt a particular course of action.

Complaints in all other designated areas are dealt with by county courts. If the case goes before the county or sheriff courts, an order declaring the rights of the parties may be made, an injunction or order may be declared, or damages may be awarded.<sup>51</sup> In appropriate cases, individuals may receive help from the racial equality commission, both in deciding whether to proceed and with presenting a case in the most effective manner. If the Commission considers that the case raises a question of principle, or is too complex for the individual to deal with unaided, the commission can give further assistance.<sup>52</sup>

During the period of 1976-1980, only sixty-two cases were successful before the Industrial Tribunal, and the Commission provided legal representation in fifty of those cases.<sup>53</sup> During the same period of time only twenty-five cases reached county

courts, of which only sixteen were successful, and of these all were brought with the assistance of the commission.<sup>54</sup> These figures seem to suggest that there may be an advantage in relying on the experience of the commission either in presenting the case or explaining the concepts.

Disconcertingly, there has been a significant decline in the number of requests for assistance from the commission. Part of this is due to two major drawbacks of the British legislation - back pay is absent as a remedy and British laws do not yet permit class actions so that the rights of a group of plaintiffs could be adjudicated at the same time.<sup>55</sup> At the same time, it is felt that when discrimination is found, the low amount of damages does not make the trouble worth its while. This criticism exists irrespective of which route, commission or court, is taken by the complainant. Thus it is apparent that any proposed remedy must avoid these pitfalls.

#### B. England's Sex Discrimination Act, 1975

England's other legislated protection, the Sex Discrimination Act, gives a right of action to the individual, but also allows the Equal Opportunities Commission ("EOC") to assist and represent the complainant in appropriate cases. The EOC itself can also bring certain proceedings.<sup>56</sup> While an action can only be brought in a county court, all the remedies of a high court will be available.

The protection from sex discrimination in England is not handled in a unified way. Where the claim occurs in connection

with employment, it will be dealt with by an industrial tribunal. The tribunal compensates according to tort rules which a county court would apply, and this can include damages for injury to feelings. However, it has been subject to the upper limit set for tribunal awards generally.<sup>57</sup> The limitation periods are brief- the time limit under the Sex Discrimination Act is six months (three months if in relation to employment) as compared to s. 57 (5) of the Race Relations Act which has a limitation period of eight months.<sup>58</sup>

Despite these limitations, some viewed the Act's blend as a good one:

This combination of the right of individual access to the courts, with strategic functions attached to a Commission responsible for enforcing the law in the public interest, is an ambitious attempt to combine the virtues of tort and administrative law.<sup>59</sup>

Irrespective of any apparent virtues, the English law reports, so far, offer only one court case on sex discrimination -- Gill v. El Vino Co.Ltd.<sup>60</sup> There certainly may be other instances but to date they have not been recognized as noteworthy by law reports.

Gill v. El Vino Co. Ltd. was brought by two women, lawyer and a journalist, who had not been allowed to stand at the bar at a popular wine bar close to the courts. Instead, they were told they would have to be seated at one of the tables.<sup>61</sup> The plaintiffs claimed that they had been discriminated against because they were treated less favorably than men, being



denied the opportunity to drink where others drank, to mix with other people ( particularly business associates ) and denied a choice of companions.<sup>62</sup> The remedies sought were a declaration and an injunction to prevent future breaches.

The respondents tried arguing that if the women had been treated differently there really was no detriment to them here, and if there had been, it was more a matter " de minimis". However, Judge Eveleigh pointed out that the de minimus argument was not appropriate where what had been denied to the plaintiff was the very thing that Parliament sought to address, namely, services and facilities provided on an equal basis. Consequently, a significant detriment need not be shown and the plaintiffs got the desired declaration.

It is apparent that the English legislation, although allowing for a tort action, is ineffectual in many respects. Considering the political stripes of the present government, it probably is intended to be so. The Commission can help complainants in bringing court cases (and are helpful when they assist), but it is unclear whether the commission is under obligation to do so. However, more deleterious, the tort remedies themselves are exceptionally limited by legislation, either in terms of being limited to injunctions or declarations or, where damages are allowed, in the level of damages allowed. These limitations seriously discourage the use of the action.

## B. The American Efforts

The Americans have developed a substantial jurisprudence in the use of torts for the protection of rights, particularly where violations of human rights by public actors occur at the state or federal level.<sup>63</sup> Following the Civil War with Section 1983 and again in 1964 with the Civil Rights Act, 1964, the American Congress enacted statutes dealing in the areas of discrimination. Several additional acts have been added since that time.

Both Section 1983 and the federal tort routes have been well - used in American courts.<sup>64</sup> As a matter of fact, to some, the extensiveness of use has actually been perceived to be a downfall in that American courts over the last few years have responded by establishing defences or by interpreting the rights in a manner that reduces the chances of success. Part of the reason for this appears to be the fact that these torts are dealing with public actors and public allocation of resources, areas which are not traditionally seen as within the purview of the courts.

### 1. Civil Rights Act, 1964

This federal act, inter alia, gives district courts in the United States jurisdiction to give injunctive relief against discrimination in public accommodation and authorizes the Attorney General to institute suits to protect constitutional rights in public facilities.<sup>65</sup> It also extends the Commission on Civil Rights to establish a Commission on Equal Employment

Opportunity. In public accommodation cases, if the Court figures they can get voluntary compliance they will send it over to the Community Relations Service first .

Title VII of the Act deals with equal employment. "The expressed aim of Title VII is to prohibit all practices that create inequalities in the workplace among identifiable groups and thus the remedies available under Title VII operate to redress the impact of discriminatory actions on protected groups than on individuals." <sup>66</sup>

Basically, under this section the person files a "written charge" with the Commission which endeavours for voluntary compliance. If there is a local law prohibiting the unlawful act, the person must go the local route first. Any local body has sixty days to commence proceedings.<sup>67</sup> If they have not or if the matter was terminated before that, the person can proceed the federal route.

A charge must be filed within nine months.<sup>68</sup> Once the Commission is seized of the matter, they have thirty days to get voluntary compliance.<sup>69</sup> After that point the person can commence a civil action. The court may, if it is deemed just, appoint an attorney for the complainant without the payment of fees, costs or security. In this way some of the financial disadvantages against the victim are mitigated. If the Attorney General feels the case is of public importance, she or he may be permitted to intervene in the action.

Title VII focuses mainly on institutional change as it authorizes equitable remedies. The complainant can get

reinstatement, promotion, hiring of employees, with or without back pay.<sup>70</sup> Unfortunately, other damages such as mental or emotional harm have been disallowed.<sup>71</sup>

It became apparent in the American scene that in some instances of rights violations, such as sexual harassment in the employment sphere, <sup>72</sup> not all the damage suffered was being compensated under Title VII. In particular her sense of degradation and humiliation and the cost of her psychological care remained uncompensated.<sup>73</sup> The result was that individuals who suffered this form of right violation began to go to other legal theories to redress their injuries, and found that state statutes and state common law provided a variety of causes of action for sexual harassment.<sup>74</sup>

As an example, American wrongful discharge theory has held that dismissal for a refusal to date her employer violated an implied covenant of good faith and fair dealing between the employer and the employee.<sup>75</sup> Traditional tort theories such as assault and battery, negligent or intentional infliction of emotional duress, invasion of privacy and tortious interference with a contract of employment have been successfully advanced in sexual harassment cases.<sup>76</sup> Presently, these are used concurrently with a claim of sexual harassment under Title VII. The state tort claims are not seen as a total panacea, though, because under state tort theory injunctive relief is not available to shape future behaviour and change social norms of the workplace. <sup>77</sup>

One last matter that is noteworthy. In American law in this area, insurance may cover some of the employer's claim. While a standard employer liability policy does not cover claims for sexual harassment per se, it sometimes covers "bodily injury by accident or disease", which includes the emotional and psychological sequelae. Thus, the unauthorized invasion of the employee's body or offensive touching may constitute assault and battery which may be compensable.<sup>78</sup> To some, this policy of insurance protection seems indefensible in the sense that the employer would be buying a way out of facing the full financial consequences.

#### IV. Conclusion

Each of these forms of tort actions has had deficiencies, some greater than others. It would appear that for torts to succeed in the area of human rights, at a minimum, what is needed is 1) underlying principles to which can judges turn for guidance, 2) leeway for the judges to tailor the remedy to meet the specific problem, and 3) some form of legal assistance for the complainant.

The extent to which those facing harm will use the remedy will always be a significant concern, as will the direction and interpretation of the rights when developed by the courts. It has been pointed out that in Charter litigation concerning sex equality rights, women ( as a less powerful group ) make less use of the Charter as a tool than do men. Perhaps, as a result,

the sex equality arguments advanced ( and accepted) in the courts support male -oriented themes and interpretations. 79

## CHAPTER 6 FOOTNOTES

1 A. Schafer, " Privacy- a Philosophical View" in Dale Gibson (ed.) Aspects of Privacy Law (Toronto: Butterworth, 1980) p. 18.

Saskatchewan, British Columbia, Newfoundland and Manitoba each have privacy acts . Also see, P. Osbourne " The Privacy Acts of British Columbia, Manitoba and Saskatchewan" in Dale Gibson (ed.) Aspects of Privacy Law (Toronto: Butterworth, 1980) p. 73 ff.

2 Schafer, supra n.1 at 15. Also P. Vegleris " Twenty Years of the Convention and Future Prospects " in A.H. Robertson (ed.) Privacy and Human Rights, (3d) (Manchester: Manchester University Press, 1973) 340 at 345 who sees right of privacy combining with freedom of thought and conscience to guard the individual's intellectual freedom.

3 Schafer supra n. 1 at 15. As our technology expands, for others there is a perception that it impacts strongly into more and more aspects of our lives and consequently privacy requires more protection. As illustration of some ways our lives have been encroached upon, see the 1987-8 Annual Report of Privacy Commissioner 's concern over AIDs testing, employee screening, disclosure of medical data, reliability and security screening. It is recognized that "human beings are self- conscious beings. To monitor their conduct without authorization is to show less than proper respect for their dignity." Schafer, supra n.1 at 17.

4 Osbourne, supra n. 1 at 103.

5 Ibid. at 108.

6 P. Burns " The Law and Privacy: The Canadian Jurisdiction" (1976), Can Bar Rev. 1 at 38 sees costs as the main reason why so few actions.

7 P. Osbourne, supra n. 1 at 101.

8 Ibid.

9 Rookes v. Barnard [1964] A.C.112 . Lord Devlin says that exemplary damages can be properly awarded whenever it is necessary to teach a wrongdoer that tort does not pay.

10 P. Glenn, in Dale Gibson (ed.) Aspects of Privacy Law (Toronto: Butterworth, 1980) p. 43-44. Indeed "its creation has been therefore largely the work of Quebec courts, whose efforts... have now received legislative approval with the enactment of Article 5 of the Charter of Human Rights and Freedoms.

11 Ibid at 58.

12 Article 49, paragraph 2 Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12 as am.

13 \$3000 was awarded in 1957 in Robbins v. C.B.C. (Que.). When the Plaintiff criticized the C.B.C., they reproduced on television his letter to them, telling people to write him to "cheer him up".

14 Race Relations and the Law, Report of a symposium held in Vancouver, B.C., April 22-24, 1982. (Minister of Supply and Services Canada, 1983).

15 Courchene v. Marlborough Hotel [1972] 1 W.W.R. 149, 22 D.L.R. (3d) 157.

16 Hinds v. C.E.I.C. (1988), 24 C.C.E.L. 65, 10 C.H.R.R. D/5683 (Can. H.R. Trib.).

17 Ibid. at 152 of W.W.R version.

18 Ibid at 153. Qualified privilege allows for the expression of opinions that might ordinarily constitute libel in conversations among people with a mutual concern, as long as these are expressed without malice.

19 Civil Rights Protection Act, (1981) c. 12.

20 Supra, n.15 at 98. Up to \$2000 fine for any individual, \$10,000 fine where committed by a group.

21 Ibid. s. 1 (1) (a) and (b).

22 Supra, n. 15 at 98.

23 Brochu v. Nelson, [1986] B.C.D. Civil [1931-02].

24 S.N. 1988 c. 62 s. 24. The section is subject to s. 30 wherein all prosecutions must be proceeded with the consent of the Minister.

25 Bhadauria v. Seneca College (1979), 11 C.C.L.T. 121 Reversed by Seneca College v. Bhadauria, [1981] 2 S.C.R.191.

26 Aziz v. Adamson, (1979 11 C.C.L.T. 134.

27 Ibid. at 138.

28 Ibid. at 139. The question is whether this statement was in reference to being technically there( i.e the ambit of legislation) or differences in conclusion over whether violation.



29 The question, of course, is "reasonable" in whose eyes?

30 Quebec Report on Civil Rights published by Government of Quebec (Montreal, 1968) at 17.

31 See Dame Gooding v. Edlow, [1966] C.S. 436 action for damages - racial discrimination in accommodation as contrary to "ordre public et aux bonnes moeurs". It also undermines peace within our society.

32 P. Patenaude, "The Evolution of the Right To Privacy in Quebec" in Law and Society in Canada: A Historical Perspective, D.J. Bercuson and L.A. Knafila (eds.) (University of Calgary, 1979) 45 at 46.

33 *Supra*, n. 30 at 5.

34 Some changes occurred - such as the controversial replacement of the suggested "everyone has a right to life..." with "every human being has a right to life."

Actually, this may be more a problem of translating from French. In the Draft Code, "toute etre humain a droit a la vie" translated as "everyone has a right to life", yet "toute personne" also translated in the draft as "everyone". In the Quebec Charter, the English translation of "toute etre humain" is given as "every human being".

35 S. 49 of Quebec Charter states "Any unlawful interference with any rights recognized by this Charter entitles the victim to cessation of such interference and compensation for the moral or material prejudice resulting therefrom."

In case of unlawful and intentional interference the tribunal, may in addition, condemn the person guilty of it to exemplary damages.

36 *Supra* n. 30.

37 Article 10 of the Quebec Charter.

38 P. Osbourne, *supra* n.1 at 109.

39 *Ibid.* at 109.

40 It would seem that all cases that are not settled are up for recommendation to go to court. The Commission can bring a case on its own behalf, on the behalf of a victim or the victim can bring it on his or her own.

Technically, only a tribunal can give exemplary damages.

41 Knopff, R., "Human Rights Litigation 1956-1984: A Statistical Profile" (1987), 8 C.H.R.R., C87/1 Knopff concludes that Quebec

courts hve been more conservative than tribunals elsewhere. Whereas the success rate for complainants elsewhere in the country was 63%, in Quebec it was 41.5%. Perhaps for that reason Bertrand Roy of the Quebec Human Rights Commission had been pressing to leave these matters totally to tribunals.

42 C.D. P for Leclair c. Paquet et Paquet D/ 444 ( 1981), 2 C.H.R.R. See also C.D.P. c. Antoniadis (1980), 1 C.H.R.R. D/ 188 where a couple with three children were left on hold for six weeks before a owner signed a lease with someone else. The family tried arguing there was discrimination on the basis of social condition.

43 Other instances where discrimination on the basis of "social condition " include C.D.P. for Andre Mercier c. La Ville de Beauport ( 1982)( denied janitor position with police department because of criminal record).

44 Aronoff c. Hawryluk (1981), 2 C.H.R.R. D/534 refusal to rent to a divorced woman living alone, netted \$420 for material prejudice and \$100 for moral prejudice.

Johnson c. Rochette ( 1982), 3 C.H.R.R. D/ 1133. Wife wanted stricken from custody agreement that she could not see her homosexual lover in front of the kids. Evidence showed that the father wouldn't have minded if the lover was a guy. Court says this is discrimination on the basis of sex.

45 Le Pretre c. Auberge des Gouveneurs (1980) , 7 C.H.R.R. D / 3356 [1986] D.L.Q. 30 ( C.S. Que.).

46 Gagnon c. Brassiere La Bulle Inc ( 1981 ), 7 C.H.R.R. D/ 3357 [1986] D.L.Q. 28 ( C.S. Que.).

47 Johnson c. Comm. des Affaires Sociales , [1984] C.A. 61 (C.A. Que.) reversing [ 1981] C.S. 994 (C.S. Que.).

48 Senay c. Corp. des Aliment Ault ( 1985), 7 C.H.R.R. ( C.S. Que- affirming 7 C.H.R.,R. D/ 3373 ( C.S. P. Que.).

49 C.D.P. c. Thiverge ( 1980) , 1 C.H.R.R. D/191 , sought \$200 each, \$100 for dignity, \$100 exemplary, received \$25 each and costs.

C.D.P. for Comete de Citoyens Espaces Verte Lasalle Inc (1982), 3 C.H.R.R. D/ 659, in a case involving discrimination against a corporation. C.D.P. was asking \$100, gets \$500.

50 Thibault c. College de Sherbrooke ( 1981), 2 C.H.R.R. D/ 530 ( \$1) and Lechance c. Thiverge ( 1980) , 1 C.H.R.R. D/191 ( C. Prov. Que.) ( \$25 damages).

51 Supra n.15 at 118.

52 Ibid.

53 Ibid. at 123.

54 Ibid.

55 Ibid.

56 G. Williams, The Foundation of Torts, (Toronto : Butterworth, 1976) at 172 Under s. 66 (1) (a) of the Sex Discrimination Act the Commission can help the person decide whether to pursue proceedings ( Also under the Race Relations Act s. 57 (1) (a) ) and to help formulate and present the case and they may even give assistance in the case , but the complainant must give notice to the Commission of commencement of proceedings.

57 " Statutes" ( 1976), 39 Mod. Law Rev. at 445. In 1976 this was £5200.

58 S. 66 (5) of the Sex Discrimination Act.

59 G. Williams, supra n. 56 at 172.

60 Gill v. El Vino Co. Ltd. , [ 1983] 1 All E.R. 398 ( C.A.).

61 Ibid. See also Ministry of Defence v. Jeremiah , [1979] 3 All E.R. 833, [1980] Q.B. 87.

Peake v. Automotive Products , [1978] 1 All E.R. 106, [1978] Q.B. 233, C.A. ; Quinn v. Williams Furniture Ltd. I.C.R. 328 ( C.A.), Schmidt v. Austicks Bookshops Ltd. [1978] I.C.V.R. 85, E.A.T.

62 While this matter may seem trivial, one needs to consider whether it is really in light of the demands for development of business contacts in the somewhat social setting . At the same time is the need to change our presumptions- the club's rule is patronizing of women etc. The case , however, highlights the problem of who the plaintiffs will be. Will they necessarily be the well educated, the better informed. Perhaps originally but this may change with success of others.

With regard to associating in "private" clubs and the development of business contacts in the American sphere, see : H. Hacker " Private Club Membership : Where does Privacy End and Discrimination Begin?" ( 1987) , 61 St. John's Law Rev. 474 at 476 where the right to associate freely with others for social as well as business and political purposes has been the hallmark of equality.

63 Section 1983:

Civil rights torts arise from a number of different statutes, but section 1983 has been a major source of litigation . Section 1983 is a federal act which states that there will be a suit at law where any person under colour of "any statute, regulation, custom or usage of any State" causes another person to be deprived of a Constitutional

right. This statute creates a federal cause of action, governed by federal law and brought before a federal court for what is referred to as a constitutional tort (Dobbs, p. 62)

The reason Section 1983 is seen as more favorable for the plaintiff to bring actions before that forum, is that judges seem more favorable to the cause (being less tied to the politics and attitudes of the region), the juries are drawn from a wider area and have a different demographic composition. Also a section 1983 claim permits the prevailing party to recover reasonable attorney's fees, while the rule in ordinary tort cases is that each party pays for his or her own attorney fees (Dobbs, p. 62)

If the actor is a federal actor, the plaintiff sues, not under 42 U.S.C. section 1983, but directly under the federal constitution. The traditional view is that the plaintiff can sue under section 1983, even though her claim could just as well come under state tort law. (However there are situations where an adequate state remedy will mean there is no constitutional violation at all, such as when the state takes the plaintiff's property but there is a mechanism by which he can force the state to pay for it. Parratt v. Taylor, 451 U.S. 527 (1981)).

64 C. Whitman, "Constitutional Torts" (1980), 79 Mich. L. Rev. 5.

65 Once again in the area of private club area, see H. Hacker supra, n. 62. The Civil Rights Act, 1964 makes an exemption for "private clubs", but the designation is often a sham to evade the Act.

66 J.L. Dockart and E.L. Malchow, "Sexual Harassment in the Workplace" (1987), 23 Tort & Ins. L.J. 383.

Cites Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976) Also Griggs v. Duke Power Co., 401 U.S. 424 (1971).

67 Civil Rights Act of 1964 s. 706 (b).

68 Ibid. under ss. (a)

69 Ibid. under ss. (e).

70 There is mitigation of damages under ss. (g). Also may get as a prevailing party reasonable attorney's fees.

71 Henson v. City of Dundee, 682 F. 2d 897, 905 (11th Cir. 1982) (denying recovery for mental suffering and emotional distress); Bundy v. Jackson, 641 F. 2d at 946, n. 12 (disallowing damages for emotional harm); Hayden v. Cox Enters., 28 Fair Employ. Prac. Case (B.N.A.) 1315, 1316 (N.D. Ga.) (denying recovery for compensatory and punitive damages).

72 For an explanation of how sexual harassment is discrimination on the basis of sex, see the Supreme Court of Canada in Janzen v. Platy, [1989] 1 S.C.R. 1252.

73 Dockart and Malchow, *supra* n. 66 at 189.

74 *Ibid.* See, for example, Rogers v. Loews L'Enfant Plaza Hotel 526 F. Supp 523 (1981).

75 Dockart and Malchow, *supra* n. 66.

76 *Ibid.* at 190. For an interesting use of civil conspiracy , intentionally deprivation of economic benefit see Kyriazi v. Western Electric 461 F. Supp. 894 (1978).

77 *Ibid.*

78 *Ibid.* at 193.

79 G. Brodsky, & S. Day, Canadian Charter Equality Rights for Women ( Canadian Advisory Council on the Status of Women, 1989), Chapter 3, " Sex Equality Litigation".

## CHAPTER 7

BHADAURIA v. SENECA COLLEGE:  
PRECLUSION OF TORT ACTIONS IN THE AREA  
OF HUMAN RIGHTS?

## I. Introduction

It may be argued that any discussion of tort actions in the protection of human rights is belated, the possibility having already been foreclosed by the 1978 Supreme Court of Canada decision in Seneca College v. Bhadauria.<sup>1</sup>

The case involved a well-educated East Indian woman who applied for several teaching positions at Seneca College over a number of years. From time to time she was informed that she would be contacted for an interview. She was never called and she was never given any reason for the rejection of her applications. The plaintiff alleged that the people who eventually filled the positions had lower qualifications than she did. None of them, however, was of East Indian origin. For this reason she felt there had been discrimination on the basis of ethnic origin.

Seeking the right to pursue a suit in tort for the alleged discrimination, she claimed damages for wrongful deprivation of opportunity of employment, loss of self-esteem, mental distress, and insult to dignity, basing her claim on either a common law duty not to discriminate or upon a breach of s. 4 of the Ontario Human Rights Code (hereafter referred to as the Code).

Whereas it had been accepted at appeal court level that there could be a tort of non-discrimination based on the public policy exemplified by the Code, in Bhadauria, the Supreme Court of Canada found that the Code (although not expressly excluding such a remedy) was structured in such a way that tort action would not be compatible with it. This chapter examines the reasoning of both levels of court.

It is important at the outset to realize that in Bhadauria the plaintiff was not without some manner of redress. There existed human rights legislation which offered the satisfaction of having the complaint investigated and which generated further remedies if the complaint was well-founded, such as censuring the respondent and the possibility of monetary recompense.

However, the plaintiff chose to pursue a tort remedy rather than the legislated remedies available at the time. Such a choice is not surprising considering that while the Code made provision for special damages such as loss of wages, that loss had to be proven. By the nature of Ms. Bhadauria's complaint, she had not lost wages or even met any of the usual heads of damage because she did not get the position. Thus, her only financial redress under the Code would have been general damages for insult to dignity, loss of self-esteem, etc.

However, for quite a few years prior to the plaintiff's case, no human rights board of inquiry in Ontario felt it had the legislative authority to recommend payment of general damages. While the legislation was amended in 1971 to assure the

possibility of general damages, up to 1975 ( the time frame of the plaintiff's application to the College) the largest award by the commission for "psychic wounds" ( damage to reputation and dignity) was \$100.<sup>2</sup> It has been recognized that such a small sum would be more insult than consolation.

Preferring to take her chances by way of lawsuit, the plaintiff presented the court with two possible ways of finding tortious responsibility, either through a common law duty not to discriminate or under a statutory duty as established by the provisions of the Code. At first instance the claim had been struck out as "disclosing no reasonable cause of action", as it was felt that the Code established a comprehensive and exclusive scheme. In contrast , at appeal level the court felt that the common law duty based on public policy ( as detailed by the preamble to the Code) offered a sufficient basis and so never went on to judicially consider the possibility of statutory breach. The Supreme Court overturned the appeal court decision.

It is respectfully argued here that, in the main, the Appeal Court's reasoning was the better founded of the two approaches. In particular , it is argued that the Supreme Court justices erred by basing their conclusion in large part on the existence of what was presumed at the time to be an "effective remedy".

It is posited that the judiciary were dealing with a novel form of action at a point in time when several difficult tort issues accompanying the case would have to be resolved



concomitantly. Certain legal assumptions underlying Bhadauria have significantly changed over the last eleven years. Consequently, the Supreme Court decision, premised on a state of law that no longer exists, requires reconsideration. Moreover, the context in which the Supreme Court decided Bhadauria (i.e the specific framework of the Ontario legislation) can not be readily extrapolated to other provinces' legislation.

Whether human legislation ever established an "effective remedy" has already been discussed at length in Chapter 4. In summary, it may be noted the late 1970s was a period when it appeared that human rights legislation would eventually cover a greater field and it was optimistically presumed that human rights developments by way of legislation would continue to expand and strengthen, not wane. But, as we have seen, it was a presumption that has subsequently lost its vigor.

With respect to the matter of the development of tort law, this chapter will show that since 1978 most, if not all, of the tort related issues involved in Bhadauria have been resolved. The present state of tort law can provide a more reasonable foundation on which to argue for tort actions against the violation of human rights than the law as it existed in 1978.

Moreover, the courts in the 1960s and 1970s were under considerable pressure from legislatures to show deference to a variety of administrative tribunals, generally for reasons of expertise and expedience.<sup>3</sup> This trend has been tempered and in some cases reversed. Through interpretation of the Canadian Charter of Rights and Freedoms and the human rights acts,

courts have been gaining an unprecedented experience in human rights matters so that through principled reasoning it is the courts that set the standards. At the same time, one must always keep in mind that judicial deference must never be so great as to effectively wipe out the legitimate right claims of people.

## II. Reasoning of the Courts in Bhadauria

### A. The Jurisprudential Approaches

The two courts provided fundamentally different approaches to human rights concerns in this matter, one tied to positivism and deference to legislative decision-making, the other less narrowly confined. Each route is set out below, with analysis of which should be considered the better.

#### 1. Positivism

The decision of the Supreme Court in Bhadauria was one based heavily on rule of law and positivism in its widest sense of perceiving the court's proper function as being the interpreter of the law, as opposed to being judge of its value.<sup>4</sup> As often stated, the stance of the positivist has been : "The existence of the law is one thing, its merit or dismerit is another." <sup>5</sup>

By employing the traditional rules of interpretation used in positivist reasoning, the Supreme Court attempted to discover the law as it truly existed. Only where there was ambiguity, could the Court refer to "policy", which for the Supreme Court

meant something framed in the utilitarian terms of the collective good or in pragmatic considerations of the decision's impact on future cases. In Bhadauria, the Supreme Court seems to have preferred to "discover" the law, not looking to the efficacy of the remedy advanced by the legislation.

For the Supreme Court, the Ontario Human Rights Code was simply a legislated political decision about the best way for a province to deal with discrimination. The Code was a goal-based strategy and was geared to the public welfare of people living in Ontario. It was a decision that took for granted that the rights of people are best protected in a congenial atmosphere of friendly settlement and education. That policy assumed that, by changing people's behaviours in such a setting, attitudinal changes would follow. Because the legislation was geared to overall result-maximizing pleasure or general utility, a minority of the public might still find themselves either unprotected, underprotected or otherwise dissatisfied. The breadth of the legislation within this framework was a matter solely for legislative concern.<sup>6</sup>

Positivism, however, was not the only possible approach to this kind of legislation. Indeed, arguably, positivism is not the proper form for treating this subject matter. It must be remembered that human rights legislation is not the usual kind of subject matter with which positivism works. A human rights code is not a simple black letter regulatory matter such as the Carbonated Soft Drink Containers Regulations.<sup>7</sup> Instead the

legislation is a recognition of human entitlement which can not be read in a narrow fashion.

## 2. Rights Based Perspective

It is submitted that the Court of Appeal took a rights based perspective. In contrast to positivism, rights based perspectives emphasize that where questions of human rights are involved, the judge should look not only to the rule book and what it provides, but beyond it. If the rule book is silent as to the solution, then the judge should determine the conclusion which best fits the background moral rights of the parties.<sup>8</sup> Using this framework, it can be argued that within our political morality, one of the root principles is equality - the principle that, at a minimum, "no one in our society should suffer because he is a member of a group thought less worthy of respect, as a group, than other groups."<sup>9</sup> So, within the facts of Bhadauria, it is important to realize that when one discusses equality in the employment sphere one is not necessarily presuming a right to a job, but at a minimum, the right to compete with all others for that position on an equal basis. In essence it is the right to be judged on merit, to be judged as an individual, free from stereotypes. <sup>10</sup>

In marked contrast to the Supreme Court, the judgment of the Court of Appeal in Bhadauria stressed principles of equality and in doing so took a decidedly rights-based approach. By not basing the case directly on the Code, but instead upon the public policy exemplified by the Code, Madame Justice Wilson,

for the Appeal Court, moved away from a narrow black letter interpretation and moved on to a view that considered the background moral rights of the plaintiff. The Appeal Court also seemed to see the role of the judiciary as integrative with the legislature, rather than as in conflict with it.

The Court of Appeal had two choices available to it. The Court could deny the suit because there was already human rights legislation in the area and because the legislature had not explicitly stated that there could be civil lawsuits. That would have given some remedy for some discrimination in some cases. The other possibility open to the court was to permit the suit to proceed because the legislature had not explicitly excluded the possibility. The Court of Appeal accepted the latter option.

As previously mentioned in Chapter 2, the role of the judge in a rights-based perspective is to decide which of the alternatives in the case best fits with the background moral rights of the parties. The Court of Appeal accomplished this by allowing the complainant the right to pursue the tort of non-discrimination. In deciding to acknowledge the existence of a tort action, Madame Justice Wilson was undoubtedly aware that this might better capture the rights of the plaintiff for several reasons. It might eventually cover areas of discrimination that the legislature did not anticipate, or had not yet the time or the political will to tackle. At the same time it offered a measure of self-determination for victim. 11

As the judicial responsibility is to best capture the rights people actually have, within a rights-based conception a judge also has the right to examine the efficacy of a remedy.<sup>12</sup> Under this view, concomitant with the concept of "right" is the right to an "effective remedy" as opposed to some nominal form of remedy. To act otherwise would be providing mere lip service to equality and non-discrimination.

Assuming for the moment that human rights legislation faltered in some respect, presented with evidence that the legislation did not work the way it was set out on paper,<sup>13</sup> a court properly could consider any gap between the intention and the reality and properly could do anything within judicial power to lessen the gap.

### 3. The Better Jurisprudential Approach to Bhadauria

Because the subject matter of Bhadauria is non-discrimination (an inalienable right of all people) a rights based approach is the more sound basis for jurisprudential analysis in the case. Inalienable rights, by their nature, are not to be and cannot be subjugated by considerations of policy such as those that positivism would characteristically consider. That it might seem economically sound to discriminate or seem administratively more efficient to discriminate are both irrelevant issues. Instead, at most these rights can only be balanced against against other human rights.

## B. Breach of Duty

### 1. Introduction

In Bhadauria one of the core issues discussed at both the Supreme Court and Appeal Court level was whether the legislation itself could give rise to a private right of action, with the two courts coming to different conclusions on the matter. The Appeal Court sidestepped the question of a legislated duty, relying on the statute mainly as evidence of a duty at common law, probably for some of the reasons detailed below, but possibly because relying on the statute alone would severely restrict the development of principles that could respond to new forms of inequality. Conversely, the Supreme Court summarily denied there could be a common law duty, placing the bulk of its examination on whether there could be a duty established by the statute. The next sections consider each possibility in turn.

### 2. Problems of Statutory Duty- A Question of Legislative

#### Intention

For decades prior to Bhadauria there had been waged heated curial debate in Canada and England over whether courts could use statutes to extend civil duties. In light of a perceived ossification of tort law and "the encrustation of precedent", expansion in this manner was seen by many judges as acceptable and necessary.<sup>14</sup> Other courts felt that this could

be a legitimate exercise for the judiciary, but only where a legislative intention to allow the civil duty could be discerned. Unfortunately, there was no guidance on how that intention was to be determined, the "examination of intention approach" became a legendary hunt for the "will o' the wisp" and, consequently, the approach had been castigated by others as unwarranted judicial intervention and judicial law-making.

Around this same time, the traditional direction taken in statutory interpretation was if a statute was passed "in the interests of the country as a whole and not for the benefit or protection of any particular class of persons"<sup>15</sup> then, the statute's provisions could not be the basis for a civil action for the individual.

On this conventional analysis the human rights act runs into difficulties, because of the legislation's dual nature of serving both a private interest and a public interest. Whereas, allowing a civil action might serve the private interest, the public one might fall by the wayside. Typically, this is what is emphasized by those who see it as acceptable to preclude a civil remedy.

However, it may be argued that in contrast to there being a duality of interests (an individual interest in conflict with the community interest), what we are actually considering here is essentially the same interest- one of fair treatment of the individual within the community, without which both the individual and the community suffer.



### 3. The Legislation as a Comprehensive and Extensive Scheme

In the end, because of the ambiguity surrounding preclusion or inclusion of a civil remedy, both levels of court went on to examine the matter in depth. The Supreme Court's principal attack on the possibility of a legislative intention to include the tort action was through the statute itself. A great deal of stress was placed this being an extensive and comprehensive scheme, particularly in respect of the statute's administrative and adjudicative features. At the same time, considerable emphasis seems to have been placed on the fact that this was a "Code". The argument can be attacked on each accounts. Both extensiveness and comprehensiveness are conclusions of fact and one may disagree with that conclusion. Moreover, the term "Code" carries no magic of its own.

#### a. Getting beyond Labels

It is worrisome that the labelling of a piece of legislation as a "Code" somehow might have fundamentally altered the nature of the consideration for the Supreme Court, as codes are created for a variety of purposes.<sup>16</sup> Some simplify, clarify and modernize the law in an area.<sup>17</sup> Others, such as the Quebec Civil Code, operate under general rules that lead to the interpretation of the law. In contrast with both of these alternatives, the Criminal Code is a compilation of the common law rules into one book.

It is debatable as to which of these possibilities the Ontario Human Rights Code is most closely akin. The Ontario Code was a compilation of four earlier acts dealing with discrimination in several fields, and so in this sense is similar in nature to the Criminal Code. It may be argued what distinguishes the Ontario Human Rights Code from, say, the Criminal Code is that the Criminal Code, in s. 8, specifically precluded the existence of any other common law offences not included in its works. Also, the Criminal Code specifically set out all penalties and remedies. The Human Rights Code made no such explicit statement.

Over the years other provinces have also used the title "code" for their rights legislation, but their provisions are not necessarily any broader or any more extensive in what they cover or provide in the way of remedies than the human rights protection of provinces where the legislation is labelled as an ordinary "act". For example, Saskatchewan and Ontario "Codes" both have quasi-constitutional status, but so does the Individual Right's Protection Act of Alberta.

It would appear that name alone should not assist the Supreme Court in mounting a persuasive argument against allowing a civil remedy. If anything, what may be argued is that the Ontario legislature by using the term "Code" saw the legislation as a broader ethical statement than ordinary legislation. Arguably, the designation was initially meant as a flag to the judiciary to set the human rights legislation apart from most regulatory legislation and to interpret the legislation

generously, not narrowly, much in the same way that the designation "Charter of Rights and Freedoms" has in the public sphere. Part of that broad interpretation could have easily included a civil remedy.

At a minimum, a comprehensive and extensive scheme should entail the existence of a well-functioning human rights board. As has been shown previously in Chapter 4, academics have assessed the performance of the boards from time to time and have found them not only under-budgeted but also subject to significant political caprices. Moreover, the ideological bent of the government appointed individual board members may be so similar to the government's own philosophy that the board, while acting in good faith, effectively denies well-founded claims of discrimination or compensates the complainants by way of nominal awards.

#### b. Contradiction in the Supreme Court Position

It should be noted that there exists a curious contradiction in the Supreme Court decision. On the one hand the legislation was touted as being comprehensive, yet there is no specific preclusion of civil remedy. It seems strange that the legislature, having put its mind to all the other issues, would not have made some pronouncement on the exclusiveness of the legislation as well, especially considering the legislatures' celebrated vexation about this time over courts meddling in matters not rightly their

concern. In the past, that is exactly what the legislature has done in many administrative law matters .

c. Why Assume Preclusion

One reason why the court might assume preclusion of civil remedy was explained by Dickson J. in Saskatchewan Wheat Pool<sup>18</sup> a few years after Bhadauria. Justice Dickson stated as that the legislatures were increasingly stipulating private remedies for breaches of statutes dealing with consumer protection, landlord-tenant relations, business organization and securities legislation, the legislature's silence must now be taken to indicate an intention not to create civil liability. In some sense, this is merely a variation of the time-held adage expressio unius exclusio alterius, where the expression of one thing implies the exclusion of the other.

This line of reasoning has been criticized by some as being a reversion to, and a mere reversal of, the "intention theory" that the courts have usually tried to avoid. At the same time, it is possible that in specifically stating remedies in these new legislations, the legislatures, out of an abundance of caution, are pre-empting the possibility that the court might not find a civil remedy where the legislature intended otherwise.

After pointing out that Canadian law is clear that a statutory remedy does not automatically preclude a common law remedy, one writer stressed

the very existence of a human rights code bespeaks of a legislative concern with the social problem. How can it be argued that judicial recognition of a common law right not to be discriminated against is contrary to , inconsistent with , or a usurpation of legislative prerogatives? 19

The answer to this may be not so much in the recognition of the right, but in the interpretation of its boundaries, a matter which will be addressed further in Chapter 8. Even so, as the writer went on to note, court decisions have allowed private civil remedies less compelling in public importance than human rights legislation.<sup>20</sup>

#### d. Further Reasoning By the Supreme Court

One of the main reasons that the Code was seen by the Supreme Court as comprehensive in its administrative and adjudicative features was because courts were not totally excluded. Instead, the statute included a right of appeal to the Court on both fact and law. The right of appeal has already been discussed at in Chapter 4, but it should be reiterated here that not all provinces carry the same scope for appeal as the Ontario legislation. In some instances, a right of appeal is not even mentioned within the legislation. More important, however, is the limited extent to which on appeal a court can look to substantive issues. Matters are quite differently and ,typically, more narrowly defined than at first instance. Unfortunately, a court confined to a postivist perspective has difficulty taking

this into account in the course of determining whether a civil remedy can be allowed.

#### 4. The Legislation as a Policy Statement

Broadly speaking, the Supreme Court treated the whole matter of Bhadauria as a policy issue. Both the Code and the statutes preceding it were viewed as legislative vehicles designed to eliminate discriminatory treatment of a persons on grounds selected by the legislature.<sup>21</sup> The legislature was seen as creating a broad act designed to benefit the private individual and the community. Thus, the question arose whether therefore the courts should create an adjunct that would assumedly serve only certain private interests. If the courts acceded to private interests they would run into the problem that a collateral lawsuit might well undermine the whole legislative scheme.

The statute worked towards friendly settlements. In contrast, adjudication necessarily makes its decision at the conclusion of an adversarial process. As a condition of settlement the Human Rights Commission may publicize the infraction and the awards, but private lawsuits are assumed to mean private out-of- court settlements, with little or no attendant publicity. Thus, to some, it may seem that the opportunity to educate the public about impermissible conduct would be circumscribed or totally lost.<sup>22</sup> Each premise should not be unquestioningly accepted. It may also be suggested that

there are ways of addressing these concerns about publicity and education of the public.

a. Proceeding Through the Board First

It has been suggested that the person could be required to go through the Human Rights Commission process first, at least to the point where it becomes apparent that friendly resolution is not possible.<sup>23</sup> Of course, there are deficiencies associated with pursuing the board remedy first. To draw from the experience of labor law, in instances where negotiation also includes the prospect of binding arbitration, the parties, while not technically refusing to negotiate, instead take a severe position, on the basis that this will give their side greater leverage later on during arbitration. So too, it may be that human rights cases twinned with the threat of a lawsuit will cause the "friendly settlements" to become intractable, with few cases going all the way to successful, peaceful conclusion through the commission.<sup>24</sup>

b. Attendant Publicity

A few comments may be made with respect to attendant publicity. Firstly, it may be questioned whether it is the issue or it is the method which draws the public attention for human rights cases. For example, a recently publicized human rights commission case involved a baptized Sikh's being denied entry to a Royal Canadian Legion. According to the tenets of his faith, the Sikh would be required to wear the turban and carry the

kirpan, both of which potentially would be violating Legion rules against wearing headgear in the presence of the picture of the Queen and Legion rules against carrying knives on the premises.

It may be posited that it is the issue that generates public debate, not the forum. Newspapers cover the incident because it is controversial. In the circumstances of the case people find themselves asking what exactly is meant by discrimination on the basis of religion or race and asking in what circumstances is it in the best interest of the community to control a "private club" regulations.

Also, the attendant publicity, so highly touted by those who stress relying solely on the commissions, goes only to a few, perhaps unrepresentative, cases.<sup>25</sup> Not every human right commission case becomes publicized, and the average offender may find it overall in his economic best interests to pay the price and still discriminate.<sup>26</sup> At the same time, it should be noted that, typically, it is not until the case comes before the judiciary that the greatest publicity arises.

### C. Common Law Duty :

#### 1. Action on the Case

In discussing possible ways of accepting a tort, both courts considered the existence of a common law duty, each to varying degrees and with differing conclusions. Basically, if accepted, Bhadauria would have been an "action on case" because it did



not fall within the typical categories of cases such as negligence, trespass, nuisance etc. 27

By way of explanation, in the early common law all civil litigation commenced with the issue of the writ indicating the nature of the plaintiff's case. Success, however, was totally dependent on whether a form of action was available for one's case. If not covered by any of the specific forms, the case could not be heard and compensation would not be forthcoming.

The rigidity of this technical system of forms of action was eased somewhat in the thirteenth century by a new law<sup>28</sup> authorizing the Clerks of Chancery to create new writs whenever new complaints coming before them were 'in a like case' ( in consimili casu ), (" falling under the same right and requiring like remedy.").<sup>29</sup> Initially, any new cases were accepted on the basis of similarity of circumstance or principle. However, it was later noted by the legal profession that just as much importance was attached to the general principle of providing much needed remedies, as to similarity of principle.<sup>30</sup> Thus, the law gave the the justice system both the opportunity and the incentive to experiment with new remedies. 31

Action on the case required that four main elements be established: a wrong, damage from that wrong-doing, 32 remedy, and analogy.<sup>33</sup> For each court, in any particular case, the aim was to discover whether community values had, in effect, given a "right" in the sense of a cognizable claim and therefore a remedy in common law .

In Bhadauria, the plaintiff's case, in part, relied on Ashby v. White,<sup>34</sup> where a person had been denied the right to vote by a returning officer. The oft-quoted statement from Ashby is

If the plaintiff has a right, he must of necessity have a means to vindicate it and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.<sup>35</sup>

In Bhadauria, the two levels of courts seem to have taken two different approaches to Ashby and action on the case. The Supreme Court placed emphasis on the case for the "right" entailed in Ashby, stressing that voting was to be seen as a proprietary right,<sup>36</sup> which could then warrant a remedy. However, for Bhadauria the Supreme Court inferred that there was no similar proprietary right and, so, Ashby could not be relied upon for the case at hand.

There is another way of casting the case: basically, the plaintiff in Ashby had been subjected to discrimination for which there did not seem to be a readily apparent remedy in existence at the time. Chief Justice Holt in providing remedy in Ashby was both enforcing the pre-existing right to vote (or more specifically the right not to be discriminated in respect of voting) and providing a remedy for that right. This seems to be the approach the Appeal Court took.<sup>37</sup>

a. Common law precedent and Bhadauria

Prior to Bhadauria there were few precedents directly concerned with whether there could be a legally protected right against discrimination. The three or four cases offered by the plaintiff were dated prior to the late 1940's, a period when attitudes were just beginning to change. These were Rogers v. Clarence<sup>38</sup>, Constantine v. Imperial Hotels<sup>39</sup>, Christie v. York,<sup>40</sup> and Re Drummond Wren<sup>41</sup>. Those early cases were often willing to give priority to freedom of commerce rather than to non-discrimination.

Rogers v. Clarence Hotel involved refusal to serve a black in a beer parlor. The majority of the Court, in Rogers, saw the refusal to serve the black as an exercise in freedom of commerce (which was considered at the time to be a significant community value). In Constantine v. Imperial Hotels the defendants, in breach of an innkeepers' duty, refused the black plaintiff lodgings. However, because he was lodged by the defendant at another hotel, it was assumed that no actual loss had occurred, and only nominal damages were awarded. Re Drummond Wren involved a restrictive covenant on land which attempted to prohibit the sale of land to Jews. In the case the judge worried about the spectre of segregation or ghettoization that might develop if the judicial endorsement of such restrictive covenants continued. In the end, he identified several available grounds by which the court could invalidate the restrictive covenant's provision. Inter alia, the covenant

could be seen as a violation of the old Racial Discrimination Act<sup>42</sup> or as being contrary to the public policy expressed in the Act. Of these, the judge specifically saw it as contrary to public policy, arguably, so that the ratio decidendi in future cases might be extended beyond restrictive covenants.

b. Supreme Court Response to Action on the Case

The Supreme Court in Bhadauria seems to have interpreted the need for a pre-existing right in a very narrow fashion, simply examining whether the majority in any previous court decision had found a right to non-discrimination. For them for this to be an action on the case, the plaintiff in Bhadauria necessarily had to show herself as falling under some exact same right to be thus, "in a like case" .

Unfortunately for the plaintiff, many cases in the area were antiquated and could be seen as blatantly discriminatory in the conclusions.<sup>43</sup> The Supreme Court examined the precedents to date, felt that they inadequately offered the possibility of a common law tort, and summarily dismissed the possibility.

Theirs is a very conservative, narrow approach to what the common law system is, viewing it more in terms of rigid precedent than as an entity that has vitality or that transforms as community values and priorities change. The Supreme Court judgment makes no attempt to place common law precedents within a historical context or to view the role of the common law as a measure of society's values.

Moreover, the Supreme Court had a choice. It could have easily stated that the earlier cases that failed to reproach these kinds of discriminations were totally out of date with present realities and could have also concluded that the laissez-faire doctrine was no longer paramount in today's society. The Court did neither. It is unfortunate that the judiciary failed to comment on the validity of these older cases and failed to directly overturn them. Neither effort would have seriously undermined the court's conclusion on other bases and the absence of judicial comment bodes poorly for human rights development because it failed to dispense with the possibility that such practices might still be acceptable .

### c. The Supreme Court Reasoning with Respect to Precedent

In concluding that no tort action could lie for Bhadauria, the Supreme Court looked at precedent in a formalistic manner. In doing so the Court was able to cast cases that might have been favorable to the plaintiff's position as not necessarily requiring any reference to the issue of discrimination.

Constantine v. Imperial Hotels, for example , was viewed as having been decided on innkeeper's liability not on a right against discrimination . The Supreme Court stated

[ t] he common law of innkeeper's liability , historically developed along different lines from that respecting restaurants and taverns ; keepers of a common inn were under an obligation to receive travellers or intending guests, irrespective of race , colour or other arbitrary disqualification. 44

While the court might have explored the foundations of innkeeper liability further, they did not. Had they done so, they might have considered why non-discrimination was a fundamental part of the history of innkeeper liability in the first place.

As it turns out, in 1624 Chief Justice Lea explained that while the liability of innkeepers was not, as had been suggested at the time, "a custom of the realm" in the sense of a duty that people readily acknowledged to one another.<sup>45</sup> Innkeeper's liability was a judicially imposed duty, the aim of which was to counter both the discrimination and the victimization of "aliens" ("foreigners") who were travelling through the area by unscrupulous innkeepers and their "helpers".<sup>46</sup> The reason that innkeepers specifically faced these burdens seems to have been that the complaints that were being placed most frequently before the courts were against this group. The courts were preventing them from discriminating and harming foreigners because innkeepers were the group with the most frequent opportunity to victimize, defraud or steal or otherwise violate the rights of visitors.

That was not the only error in respect of precedents that the Supreme Court was to make in its decision. The Court also mistakenly drew a distinction between restaurants and taverns (Christie v. York) and "inns" (Constantine v. Imperial Hotel) with respect to liability, seeing only inns as carrying "innkeeper's liability".

Historically at least, an inn for liability "would have been a place offering food, drink, and if so required, sleeping accommodation." <sup>47</sup> Historically, the fast food establishment, the hotel chain, and the local pub all would have been on equal footing for liability for non-discrimination. Only in more recent times has there been differentiation among the types of establishments (and not for reasons of liability).

Discounting these minor errors the track for the court was still relatively clear to be able to conclude that common law had not heretofore recognized a right to non-discrimination. The greatest obstacle for the Supreme Court was in respect Re Drummond Wren where the case was specifically decided on the basis that there now existed a public policy of non-discrimination.

At this juncture the Supreme Court had two choices available to it. In light of earlier cases the Court could view the decision in Re Drummond Wren as an anomaly or it could find that the case was actually decided on another basis. Using a little judicial sleight of hand the Supreme Court concluded that because another case also dealing with restrictive covenants, and decided around the same time, was found invalid on the basis of uncertainty and restraint of alienation,<sup>48</sup> that this necessarily must have been the "true" basis on which Drummond Wren had been decided, irrespective of the grounds the judge in the case gave for invalidating the covenant.

If Judge McKay of Re Drummond Wren was around at the time Bhadauria was decided, he might have felt like Lewis

Carroll's Alice upon encountering Humpty - Dumpty, finding words taking on a peculiarity of meaning all their own.<sup>49</sup> If it is inappropriate under positivism for the judiciary to consider what the law should be, it would seem similarly inappropriate for the judiciary to speculate on what might have been the "real basis" on which another judge's case should have been decided, unless they are willing to reverse it or explicitly distinguish it.<sup>50</sup>

#### d. The Appeal Court Reponse to Action on the Case

By way of contrast, Madame Justice in the Court of Appeal decision was aware of the lack of strong precedent directly dealing with non-discrimination, and so took another tack. She placed less emphasis on precedent and directed her attention more to determining whether "community values" had now seen fit to protect these particular interests of the plaintiff (those interests being the right to not be discriminated against and to not suffer injury as a result of that discrimination). Madame Justice Wilson stressed the rights were not created by the statute, just recognized by it.

In a sense, this may be considered a view of rights as extant, as opposed to claim that first has to be recognized by an official body as legitimate. The Court of Appeal relied heavily on an argument of the existence of a "public policy" of non-discrimination, a policy which in reality had only gained recognition and momentum either on the national or the international scene comparatively recently.



While equality (even in the limited sense of and for certain persons) may have dated back to the Magna Carta, discrimination was not formally declared as reprehensible until the late 1940's in Article 2 of the Universal Declaration of Human Rights. Despite the Universal Declaration's non-binding status, Canada was not ready to sign the document in 1948. Indeed, it was not until Canada realized that by not signing, it would be in the company of non-democratic countries such as Saudi Arabia, South Africa, and Soviet bloc countries (which even then were noted for their egregious violations of human rights), that Canada eventually changed its position.<sup>51</sup>

It took until 1966 before there was drafted a legally binding responsibility on signatory states to ensure non-discrimination. Even this later instrument, the International Covenant on Civil and Political Rights,<sup>52</sup> did not come into force until ten years after its initial presentation to the United Nations.<sup>53</sup> Canada's own intransigence may have been, in part, responsible for the fact the Court of Appeal had very few precedents in support of a "public policy" argument. The cases offered were dated from the 1940's when attitudes were just beginning to change. For the most part, early courts were willing to give priority to freedom of commerce rather than to non-discrimination.

#### e. Use of Precedent by the Court of Appeal

In order to stay away from some of the negative beginnings that the Supreme Court so easily accepted as "the

law", and in order to build an effective argument, Madame Justice relied on the dissent of Mr. Justice O' Halloran in Rogers v. Clarence Hotel. There, Justice O' Halloran maintained that the denial of service was contrary to the common law principle of equality for all British subjects (a principle that he saw as "elementary" and "deeply rooted" in the British system of justice). Ordinarily, relying on a dissent judgment may be a weak tactic, except where the intention is to show that there has been a change in people's thinking.

Madame Justice then took cases from a variety of areas—restrictive covenants, contracts, innkeeper's liability—and tried to find an overarching principle that reasonably explained the results in the cases. The principle that she arrived at was that there existed public acknowledgement that discrimination was not only morally reprehensible, but legally unacceptable as well.

Through the use of those cases, Madame Justice came to the conclusion that they evinced a cause of action at common law.<sup>54</sup> One other early case not mentioned by Wilson, Johnson v. Sparrow, would have given further support to the proposition. There, the failure to allow a black couple admission to the theatre after they had paid was actionable, not necessarily on an action for discrimination but as a breach of contract.

In Madame Justice's Wilson assessment, each of previous judicial decisions underscored the existence of a continuing legal policy against discrimination. Legislation in the field merely recognized that same policy. Working from the sparse under-

pinnings that these cases gave, Madame Justice Wilson went to the Preamble of the Code and held that it, too, evinced "what is now, and probably has been for some considerable time, the public policy of this province respecting fundamental human rights."<sup>55</sup> Thus, the Code was seen as recognizing, or perhaps demarcating the bounds of, a right that already existed.

## 2. Common Law and Public Policy

The question throughout Bhadauria was whether it could be argued that the plaintiff had a pre-existing right. Arguably, the Code could be seen as creating a right (by means of a statutory duty), but, as previously mentioned, Madame Justice foreclosed the possibility when she stated that "[w]hile the fundamental right we are concerned with is recognized by the Code, it was not created by it."<sup>56</sup>

But if not created by the Code, from where could the protection come? The answer to that, quite simply, was from the part of the common law known as judicially recognized "public policy". From her statements it would appear that Madame Justice rested her analysis on an inherent common law right, exemplified by the public policy statement in the preamble to the Code.

### a. The Concept of Public Policy

By way of introduction to the concept of "public policy," it was mentioned earlier that the focus of tort law has been the protection of certain community priorities. Centuries after the

protection of traditional values of integrity of the body and property came gradual extensions to matters like emotional or psychological integrity, so that the protection of reputation created actions in libel and slander. The changes have continued.

One hundred and fifty years ago, or even forty years ago, community values would not have viewed discrimination as repugnant, but societal values have been tempered somewhat since then. From time to time these sensibilities became judicially noticed as "public policy."

Unfortunately, there is a lot of ambiguity in that catchword. "Public policy" is capable of being twinned with a variety of discordant expressions and perspectives, even personal preferences. In the words of a nineteenth century judge- unharnessed, public policy could be an unruly horse, dangerous to ride.<sup>57</sup> Still, other members of the judiciary have recognized its benefits. As Lord Denning put it

With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles. It can leap fences put by fictions and come down on the side of justice. 58

As one example of what has been considered "public policy", one judge, considering a restrictive covenant that prohibited sale of land to Jews, asserted that "[a]ny agreement which tends to be injurious to the public or against the public good is void as being contrary to public policy." <sup>59</sup> From this perspective, there seems to be the need of some evidence of

harm to the public. Restrictive covenants that would tend to segregate and ghettoize people would create such a harm .

There are other approaches. The Quebec equivalent of "public policy" is ordre public ( aconcept involving public order and good morals). <sup>60</sup> Within common law when we speak of something as "against public policy", the phrase may respectively mean "against opinion", "against public values" or somehow " against the law". The difficulty with pinning down what constitutes "public policy " is further exacerbated by the fact that " public policy varies from time to time". <sup>61</sup>

While greatly advantageous at times, this flexibility and responsiveness to changing circumstances can also be criticized as leaving the concept so vague as to be, at best , unwieldy , or at worst, judicial meddling. Thus, it became imperative for Madame Wilson that she have some concrete foundation on which to base her assertion of the existence of a public policy with specific boundaries.

In a way, this reasoning would seem to have a degree of circularity to it. Having said the right existed prior to the legislation, why would Wilson now turn to the legislation to prove something that existed prior to the legislation's enactment. Even if confirming a principle that had been in a series of prior enactments, there would seem to be nothing to indicate whether the first in the series was an embodiment of a pre-existing right or a newly created one.

Once again, the confusion here results from the amorphous nature of "public policy". Among other things public policy may be seen as existing

- i. prior to legislation ( giving the impetus to legislation , and once successful being totally embodied by the legislation),
- ii. subsequent to the legislation ( a legislative decision to change the ways things are done, irrespective what a particular group or groups of voters may say they want), or
- iii. independent of legislation (running parallel with a statute or standing irrespective of a statute - due to a constitutional division of powers issue).

Justice Wilson seemed to be of the opinion that the public policy she is addressing existed independent of the legislation, but the other two possibilities are just as likely. Indeed, as Wilson herself has noted, considering the fact that at the time of the earliest anti-discrimination legislation, no judge except perhaps O'Halloran had made judicial comment might be in any way reprehensible. The legislation seems more likely to have been put in place to change people's behaviours than as indication of it.<sup>62</sup>

Nevertheless, Madame Justice might have a reasonable rebuttal to this suggestion. The preamble to the Ontario Code talks about codifying, extending earlier enactments and simplifying their administration. Codification, as we saw earlier, often means taking that which is in the common law and placing it within the framework of a statute. Codification is

often done for clarification purposes such as when a practice has varied from jurisdiction to jurisdiction. In this sense policy existed prior to the legislation. Also, once again, a legislature can enact only that which is within its constitutional ambit. When it legislates in this area, the provincial legislature is dealing in ways that it sees best the s. 92 provisions of the Constitution Act, 1867 that it is empowered to handle. So, provinces can cover discrimination in services, goods, accommodation and employment, but cannot deal with discrimination in matters of federal concern.<sup>64</sup> Public policy against discrimination, as conceived by the common law, may well extend beyond those limitations on the province's power. In that sense as well, it exists as an extant and more far reaching right than the provincial legislation.

#### **b. The Scope of the Public Policy**

It is evident that simply demonstrating the existence of the right is not enough, its scope must also be shown. The reason delineation is considered so imperative is because it is felt that, otherwise, the court would be left with a policy over which it would have no control- a case of an unruly and unbridled horse. The Supreme Court in Bhadauria were of the opinion that Madame Justice Wilson was relying on the Code to provide those necessary standards.<sup>65</sup> Others, too, have felt the Court of Appeal made much of the fact that the particular type of discrimination the plaintiff alleged was condemned in the preamble to the code.<sup>66</sup> It thus would be difficult for Wilson to

employ the argument that the nature of public policy against discrimination was any broader than which the legislature acknowledged.

Yet, if she acceded to the conclusion that public policy was no broader than the statute, then the question becomes why rely on the common law at all? The answer has two aspects. Firstly, it is the categories of discrimination (such as race, creed, sex) that Wilson is relying on, not necessarily the provisions of the legislation such as employment, services or accommodation. To that end, it should be noted that Madame Justice specifically mentioned only the Preamble, and not s. 4 of the Code. Secondly, from her perspective, the legislation has set only the administrative scheme for those who want to use the human rights commission's services. The plaintiff in Bhadauria did not. For the plaintiff it is the common law that is relevant.

### c. The Search for Certainty

Nevertheless, none of this addresses the issue of whether there is sufficient certainty in the Preamble. The words to the Preamble of the Code seems sanguine, speaking of "inherent dignity" and "equal and inalienable rights... of the human family" as the "foundation of freedom, justice and peace in the world." Reference to public policy of the preamble is equally hortatory:

And Whereas it is public policy in Ontario that every person is free and equal in dignity and rights without regard to race, creed, colour... And Whereas these enactments have been confirmed in a



number of enactments of the  
legislature. 67

Arguably the allusion to confirmation of principles in the preamble gave Madame Justice evidence of the strength and continuity of this public policy. Thus it can be maintained that it is neither temporary nor a "will o' the wisp". Reference to the Universal Declaration of Human Rights by the Code further underscored that the policy was not idiosyncratic to Ontario either, but perhaps an obligation cognizable at international law.

Unfortunately, some may argue that words like "equal in dignity and rights" are grounded in such vagueness and generality as to be virtually worthless. The words may be seen by some as salutary gestures giving no substance to the term "public policy". Without a firm core, judicial pronouncements on public policy fall prey to the accusation of judicial law-making.

Others may argue that phrases offer no direction as to the way the public policy would be best effectuated. Consider for a moment as a contrast, Re Drummond Wren. There, the court was dealing with a deed of land and property law has underlying it a general principle of freedom of alienation of land. Consequently, the type of case (real property, combined with a public policy that stressed there should not be discrimination as that would be a restraint on alienation) almost directly pointed at only one possible answer for the

judges- invalidating the restrictive covenant. In Bhadauria the same sort of conclusive result is more elusive.

A few points need be made at this juncture. As an aside, it is submitted that judicial activism may not be an undesirable state of affairs in the area of human rights. Secondly, judges in civil jurisdictions and at international law have been working with exactly the same kind of generously worded articles for some time now, with positive results. With respect to common law, the Charter with its open texture has been giving our own judiciary the same experience. Admittedly, the exercise has not always been easy.

The fact that no one set direction is given in the preamble may not be disadvantageous. The need for prohibition occurs as quickly as people's ability to develop new prejudices and methods of demonstrating those prejudices. The latitude offered gives the Court of Appeal a better chance at, not only best capturing the rights the person really has, but also, in molding the remedy to the right.

#### d. Public Policy and the Rights-Based Perspective

It is hypothesized here that Madame Justice may well be according a Dworkinian approach to the problem in Bhadauria. In the view of Ronald Dworkin it is permissible for a judge to "make law", as long as she looks to overarching principles and decides the case in a manner that better captures the rights that people actually have.

If therefore some case arises as to which the rule book is silent or if the words in the rule book are subject to competing interpretation, then it is right [ for the judge] to ask which of the possible decisions in the case fits the background moral rights of the parties.<sup>68</sup>

With regard to Bhadauria, it is submitted that, for Madame Justice Wilson, the policy statement exemplified a moral right to be given equal consideration in employment, which in turn is predicated upon a right to equality. Also, although Madame Justice was relying on a policy statement, she was not necessarily considering the collective welfare, at least, not in any utilitarian sense. If it was a collective welfare, it was more akin to A.J.M. Milne's perspective that the overall good for the community is to protect individual and is to assure equality of treatment.

#### D. Statutory Duties

In contrast the Supreme Court placed most of its emphasis in Bhadauria not so much on common law duties, but more on whether room could be found for a statutory responsibility entailing a civil suit.

##### 1. Strict Liability

Chief Justice Laskin started the majority's analysis with a discussion of breach of statutory duty. Laskin acknowledged that cases relying on statutes "have been used in the area of negligence, with the legislation viewed as establishing standards

of behaviour, and deviation, unless excused, amounting to a species of strict liability."<sup>69</sup> His words gave little by way of hint as to the propriety or impropriety of that usage, but some have concluded that he was suggesting that reliance on statutes for anything more than just standards of conduct in negligence actions was an unwelcome extension of the common law.

Laskin's comments typify a concern about relying on statutes as evidence of the existence of civil remedy. Laskin assumed strict liability would be involved in Bhadauria. That particular conclusion came about "especially in regard to the way in which the issue herein arose". There may well be a confusion of terms here. With talking about "strict liability", there are a couple of discrete matters to which the Chief Justice might be referring, vicarious liability and "liability without fault".

## 2. Vicarious Liability

The rights issue in Bhadauria arose when the personnel department had not responded to the plaintiff's applications. Laskin may have been referring to the fact that some individual, as opposed to the College as a corporate body, may have been responsible for the decision to exclude Ms. Bhadauria, leaving the College vicariously liable.<sup>70</sup> Thus, the Court may have been concerned about the issue of an employer's vicarious liability for the acts of its employees. Under this principle only misfeasance of the employee need be shown. Once that hurdle has been met, the employer will be held for the damages

flowing from those acts. In this sense, there is liability strictly applied. However, it has been only quite recently that the Courts have started to find employers vicariously liable for the actions of their employees in respect of human rights violations.<sup>71</sup>

### 3. Liability Without Fault

While in some respect loosely connected to vicarious liability, as a term of art, strict liability "means liability without the necessity of finding fault, that is, liability where fault is not a relevant issue, whether or not it in fact exists." On a jurisprudential basis, we are more likely to hold people legally liable where they intend their act. Strict liability, intuitively, seems to run counter to that impulse by making the person liable even if they have taken reasonable steps to prevent the event from occurring.

Laskin was cognizant that strict liability had been problematic in jurisprudence, particularly English jurisprudence, about this time. Under the British regime, breach of the statute was seen as negligence per se. No relaxation of the standard of reasonable behaviour was possible under strict liability. The result was viewed as unduly onerous to the defendant.<sup>72</sup>

### 4. The Difficulties of Strict Liability

Because of the British reliance on statutes (which, typically, had typically been to support a particular standard of care in negligence actions), Laskin may have assumed that strict

liability was involved. If so, then there are difficulties with the Supreme Court's analysis in Bhadauria. It must be emphasized that this was not a tort in negligence. As Laskin pointed out early in the Bhadauria decision, this was an intentional tort- it being presumed on the facts that Seneca College or its agents intended to discriminate.<sup>73</sup>

Historically, the categories of intentional torts have been a rag-bag, but in contrast to negligence, in each instance there is a positive mental state of either foresight and desire of consequences or certainty of consequences.<sup>74</sup> Intentional torts need not carry strict liability.<sup>75</sup> A variety of defences are available and they are tailored to the circumstances of the particular intentional tort. At most, what may be argued is that this proposed new intentional tort does not readily fall into any of these categories of rebuttal. In result, there might exist strict liability. Nevertheless, we know however that the Ontario Code does permit certain exceptions and defences - for example for affirmative action ("special programs", s. 19),<sup>76</sup> for certain age categories (s.14) or for bona fide occupational requirement (s.10). If the public statute created the right, as Laskin seemed to presume, it would seem foolhardy to not consider it as a possible source for defences.<sup>77</sup>

## 5. The Strengths of Strict Liability

Even if strict liability was involved, that may not necessarily be an unfortunate state of affairs. Strict liability, despite its limitations, has served in many instances a

constructive purpose. There have been circumstances where society has decided that a particular harm is of such gravity that they have legislated strict liability for offences of that kind. Typically, these occur in public welfare offences such as pollution, but they also surface in places such as s. 246 .1 (2) of the Criminal Code where consent to sexual activity with a young teenager is no defence, even if that person is believed to older.<sup>78</sup> There, the perceived harm to youth in general was seen as outweighing a defence of consent for the accused.<sup>79</sup> In other instances too, the possible harm to society in general was seen as outweighing the excuse. In the area of tort law, strict liability typically enters into the equation where an extraordinary peril to society has been created and an ordinary standard of care will not suffice.

Basically, strict liability is in place in these instances because it is so difficult to prove either intent or conventional negligence, and the harm to society is so great. The question at this point becomes, does discrimination fall into such a category? Arguably it may. In its worst form, discrimination and the inequality it entails not only generates distrust among people, but also in the worst cases leads to open violence.<sup>80</sup>

While strict liability may be problematic in some ways to a tort of discrimination, it would not appear to be determinative of whether the tort should exist.

### E. Problems of Being an Economic Tort

In the view of the Supreme Court there were still other, possibly more serious, difficulties in acknowledging discrimination as a tortious behaviour. For one thing, Justice Laskin earmarked this as an "economic tort".<sup>81</sup> Once again there seems to be an imprecision of terms here- with possible confusion of "eco-nomic torts" with "pure economic loss" or with "compensation for loss of economic opportunity" .

#### 1. The " Economic Tort"

As a term of art, what is usually meant by "economic tort" is the protection by compensation of a person's interest in earning a living or a company's interest in the running of its business.<sup>82</sup> Difficulties with the grounding of an economic tort lay in the nature of the right:

[w]e can hardly say that there is a legal right to one's living in the way that there is a right in property, because although neither interest is unqualified, the former is qualified almost to the point of extinction by the similar right of one's competitors.<sup>83</sup>

For the most part, compensation for this kind of loss has been denied by the courts, who tend to view it as being capable of creating a drastic economic restructuring. "For, to take but one obvious example, it would clash with the paramount policies of a free market economy if the prospect of economic loss to a competitor should impede one's commercial activities."<sup>84</sup>



Even further removed from the case of the company whose actions have hurt another's business, are where one party's actions has hurt another's job prospects. What should be remembered, however, is that Ms. Bhadauria was not claiming a "right" to work, but rather the loss of opportunity to compete on an equal basis with other applicants.

## 2. "Pure Economic Loss"

A second possibility as to what the court may have meant by this being an "economic tort " is that there may have been "pure economic loss". By this, what is meant is damage that is totally unconnected to a head of physical damage. Compensation for "pure economic loss" has been a concept that has been developing very slowly in torts. Whereas the judiciary has been willing to consider economic loss deriving from physical injury (for example, loss of wages as a result of an automobile accident or loss of profits flowing from damage to a piece of machinery), other economic losses were generally left to fall where they may. The distinction between what was allowed and what was not resulted, in part, from the fact that the former losses were already tied to core areas of tort protection-- physical damage to person or property.<sup>85</sup> Although in tort law there has been "a categorical refusal to protect contractual expectancies against negligent ... damage", it is noteworthy that the courts have been more willing to redress loss against intentional damage,<sup>86</sup> which of course would have been the case for Bhadauria.

Like "economic tort", compensation for pure economic loss has been seen by the judiciary as having potentially drastic ramifications in terms of economic redistribution . Such changes to the balance of power has been considered, in some quarters, as a political role believed inappropriate for the judiciary. Courts typically worried about defendants could be facing vast liability in situations where the parties were, heretofore, legally unconnected and legally not responsible. Theoretically speaking, it is often assumed that the situation would be further compounded by the fact often there would be no way for the tortfeasors to spread the loss to a larger group, such as the public. The impact on the group's liability, therefore, would be disproportionate to any benefit they might receive.

In considering these economic ramifications for the parties and society as a whole, the courts , until relatively recently, have preferred not to intervene in actions for pure economic loss. It is easy to see those kinds of concerns coming to the fore in Bhadauria :

what we have here ...is a species of economic tort new in its instance, and founded , even if indirectly, on a statute enacted in an area outside a recognized area of common law duty. It is one thing to apply a common law duty of care to standards under a statute... It is quite a different thing to create by judicial fiat an obligation ...to confer an economic benefit upon certain persons, with whom the alleged obligor has no connection, and solely on the basis of a breach of statute which itself provides comprehensively remedies for its breach.(emphasis added)87

The Supreme Court went on to say that what was involved in Bhadauria was a refusal to recruit or to employ, and that refusal to enter into contractual relations had not been considered in common law as giving rise to any liability in tort. That, of course, is an erroneous characterization of what transpired. What the plaintiff lost was a fair chance at being considered for the position and that is tortiously compensable as loss of economic opportunity.

### 3. "Loss of Economic Opportunity"

Laskin's reference to this case as an "economic tort" carries at least three possible meanings. Of these, compensation for loss of economic opportunity is the most likely, "especially in light of how the circumstances arose". Yet compensation for loss of opportunity is probably easiest for a judge to handle. Admittedly, elements such as how long the plaintiff might have been employed by the College or how far she might have advanced might be open to conjecture, and courts typically avoid those precise calculations simply because of the vicissitudes of life. Nevertheless, the court could still quantify the plaintiff's chance of success had she been permitted to interview using simple probabilities.<sup>88</sup> Undoubtedly, the estimation would be very rough, but it is still a task that the Court carries out on a regular basis.<sup>89</sup>

## F. Floodgates

In Bhadauria there may also have been an undercurrent of fear that if the tort was permitted the court would not be able to contain its effect to the parties involved. The damages paid by the College might be passed on to the public by way of increased fees, but there would be both political and regulatory limits on that capacity to pass these on.

Perhaps even more worrisome to the court was the possibility that the floodgates were being opened to any kind of distinction made among applicants. One can imagine the situation of a large number of applicants for positions, all claiming discrimination (rightly or wrongly) and all with whom the respondents would have had no previous connection whatsoever. In each instance a College (or any prospective employer) would be leaving itself open to a lawsuit which it would have to defend or settle.

A few comments need to be made with respect to this argument though. As we have seen in the Charter area, legal reasoning develops on a case-by-case basis to establish the what constitutes reasonable distinctions as opposed to what constitutes "discrimination". This case-by-case development holds back the flood.

Also, it a misconception to see the parties as unconnected. They are part of the same community whose continued existence depends on conditions of which trust, promise and respect of the rights of others.<sup>90</sup> Without these there could be

no joint undertakings, no systematic co-operation, and as a result no community. 91

Also, expansion of liability, especially in the human rights area, may not necessarily be disadvantageous if, in effect, it would dissuade discrimination. Arguably, it would take merely a few well publicized cases of heavy damages to change, not only this employer's behaviour, but to act as a caveat to others as well. Reliance on this method of altering behaviour will depend on how important we consider non-discrimination to be.

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 CHAPTER 7 FOOTNOTES

<sup>1</sup> Seneca College v. Bhadauria (1979) 11 C.C.L.T.121( Ont. C.A.) (hereinafter referred to in the footnotes as Bhadauria ) reversed by Seneca College v. Bhadauria, [1981] 124 D.L.R. (3d) 193 ( S.C.C)., (hereinafter referred to in the footnotes as Seneca College)

<sup>2</sup> I. Hunter , "Civil Actions for Discrimination" (1977), 55 Can Bar Rev. 101 at 102.

<sup>3</sup> An example of that assumed bent of the commissions was given by John Laskin, counsel for the Ontario Human Rights Commission in 1981. At that time he gave testimony before Ontario's Legislature's "Standing Committee on Resources Development" to consider proposed amendments to the Ontario legislation. Mr. Laskin summarily dismissed Ms. Bhadauria as not having shown good judgment by bringing the action to the court, apparently feeling that one would get a more sympathetic hearing from the commission "and basically an innate sympathy for complainants than you are to get from the courts". Proceedings of the Standing Committee on Resorces Development, Tuesday, October 6, 1981, 47.

<sup>4</sup> For the purposes of this paper H.L.A. Hart's definition of positivism will be used:

Here we shall take Legal Positivism to mean the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so.

H.L.A.Hart, Concept of Law, (11th ed.) ( Oxford: Clarendon Press,1981) p.181.

<sup>5</sup> Ibid at 202. Positivism is a view that sees the judiciary as distinct from and independent of any other part of the government - with a different and totally separate role from any other branch, as opposed to a rights based perspective which sees the branches as more integrated in some respects- working towards the same objectives.

<sup>6</sup> As the Supreme Court notes at p. 195 of 124 D.L.R., the Ontario Code was designed to eliminate discriminatory treatment of a person on grounds "selected by the Legislature as being irrelevant to the substantive considerations involved and as being, objectively, criteria that were offensive and violative of equality before the law."

<sup>7</sup> SOR / 79 563

8 R. Dworkin, A Matter of Principle, (Cambridge, Mass.: Harvard University Press, 1985) p. 16.

9 Ibid. at 302.

10 R. Knopff "Human Rights Litigation, 1956-1984: A Statistical Profile." 8 C.H.R.R. c/87-1.

It is self evident that employment is highly important within our society. It provides not only the necessary funds for survival but also establishes an integral sense of identity. Commonly when we first meet a stranger, our next question asked after what is her name, is what does she do. Employment is fundamental to self-determination, as it offers the possibility of choice in residence, life style etc. Yet, the importance of employment is only a set upon which the right of equality is played. Even if one was living in more of a social welfare state where one did not necessarily have to work and where one derived self-satisfaction from other sources, the right to equality would subsist.

11 S.Day, "Impediments to Achieving Equality" and Ken Norman, "Problems in Human Rights Legislation", in S.L. Martin and K.E. Mahoney eds. Equality and Judicial Neutrality (Carswell : Calgary, 1987) at 403 and 406 respectively.

12 The Supreme Court of Canada has examined the reality of the way procedures operate in the Morgentaler case.

13 Operation Dismantle v. The Queen, [1985] 1 S.C.R. 44- Madame Justice Wilson says that while judges can not express their opinions on the wisdom of the executive's exercise of its powers, the judiciary can examine if that executive exercise violates a person's rights.

14 A. Brudner, "Note of Cases, Saskatchewan Wheat Pool" (1984), 62 Cdn. Bar. Rev. 668 at 671.

15 C.P. Airlines v. R., [1979] 1 F.C. 39, 97 D.L.R. (3d) 511 (C.A.) This type of interpretation looks to legislative intention.

16 See C.McCruiden, "Codes in a Cold Climate" (1988), 51 Mod. Law Rev. p. 431. Codes may include provisions:

- (i) to codify existing non-legal practices;
- (ii) to codify the already existing law of the courts and/or the previous legal interpretations on a particular issue of the body making the code;
- (iii) to set out a recommended good practice; and
- (iv) to interpret independently those statutory provisions for which the body making the law has some responsibility.

The first and second are backward looking and consolidatory, the third and fourth are forward-looking and obviously "legislative" or "judicial".

17 Ibid. at 431.

18 R. in right of Canada v. Saskatchewan Wheat Pool, [1983] 1 S.C.R. 205, 143 D.L.R. (3d) 9.

19 I. Hunter., "The Stillborn Tort of Discrimination" (1978), 14 Ott. Law Rev. 219 at 223.

20 I. Hunter, " Civil Actions for Discrimination" , [1977] 50 Can. Bar Rev. 106 at 122. This article was written before the Supreme Court decision in Bhadauria came down.

21 Seneca College, supra n.1 at 196.

22 J. Keene, Human Rights in Ontario, (Toronto: Carswell, 1983).

23 A similar process is shown at international law with regard to other human rights concerns under the Optional Protocol to the International Covenant on Civil and Political Rights, where the complainant must exhaust domestic remedies before approaching the international body. This requirement, however, exists for reasons concerning domestic sovereignty, not rights. Basically you do this where the statute creates the right and the position of the writer is that the statute did not create the right, just recognized it.

24 One other posited difficulty of pursuing the legislated remedy first concerns the possibility of res judicata, the same subject matter having been heard in two different legal fora. Arguably, res judicata would not be involved in such instances, if only because the issue at hand has not been finally determined. Depending on the circumstances, the legal matter has instead been cut off before the point where there has been a final determination of the matter. Alternatively, the subject matter and the accompanying interest before each forum may be different.

25 It is a term of settlement for the federal human rights cases is that they may use the complaint to educate the public, not that they necessarily will.

26 For a statistical breakdown of how various types of respondents and complainants fare see : R. Knopff, supra n. 10.

27 D. Gibson, "The New Tort of Discrimination: A Blessed Event for the Great-Grandmother of Torts", 11 C.C.L.T. 141 at 142.

28 Statute of Westminster II in 1285 A.D.



29 D. Gibson *supra*, n.27, at 141.

30 A. K. Kiralfy, The Action on the Case, ( London: Sweet & Maxwell,1951) 7-8.

31 *Ibid.* at 7.

32 Wilson in Bhadauria says gist of action on the case is special damage, but the Kiralfy book does not seem to necessarily limit it to special damages, see, for example, actions on slander or deceit.

33 Kiralfy, *supra* n. 30 at 9-15.

34 Ashby v. White (1703) Holt K.B. 524, 2 Ld. Raym. 938, 1 E.R. 417 ( reference will be to Ld. Raym. version).

35 *Ibid.* at 953.

36 G. Williams in The Foundation of Tort (Toronto: Butterworth, 1976) at 56 sees a fallacy here in Ashby - that this is not a "right" to vote with a correlative duty on the returning officer, only a power to vote. Also, he says that the second fallacy is because the plaintiff's right have been violated, that he necessarily had an action, even without proof of actual damage. Instead, he suggests that refusal of a vote is damage to a voter. p. 58.

37 There is an alternative to this as well- as previously mentioned, action on the case would be relied upon could be pointed to provide either a right or a remedy.

Unfortunately the Ashby decision will be seen by some as a non sequitur - if one cannot point to a remedy, can one say that there is "right" or an acknowledged "right-claim"? Again in human rights terms , the right exists independently of the enforcement of it but it is imperative to work towards the enforcement of the right.

38 Rogers v. Clarence Hotel, [1940] 2 W.W.R. 545, 55 B.C.R. 214, [1940] D.L.R. 583 ( C.A.).

39 Constantine v. Imperial Hotel , [1944] 2 All E.R. 171 (K.B.).

40 Christie v. York , [1940] S.C.R.139, [ 1940] 1 D.L.R. 81.

41 Re Drummond Wren , [1945] O.R. 778., [1945] 4 D.L.R. 674.

42 Racial Discrimination Act, 1944 (Ont.), c. 51.

43 For example, see Christie v. York , *supra* n. 39 and the majority opinion in Rogers v. Clarence Hotel, [1940], *supra* , n. 38.

- 44 Seneca College, supra n. 1 at 201.
- 45 Jewish law and Muslim law both have similar early remonstrations about discriminating against others. See, for example, H. Cohn, Human Rights in Jewish Law (New York: Ktav Publishing, 1984) p. 166.
- 46 Resolution of Judges, (1624) Hut 99.
- 47 24 Halsbury, "Inns and Innkeepers", § 1201 ff.
- 48 Re Noble and Wolfe v. Alley, [1951] S.C.R. 64, [1951] 1 D.L.R. 321.
- 49 "When I use a word, "Humpty Dumpty said in a rather scornful tone " it means just what I choose it to mean - neither more nor less". From Lewis Carroll Alice Through the Looking Glass.
- 50 The problem here is that the court would not want to reverse the result of the case though.
- 51 D.J. Harris, Cases and Materials on International Law, (London: Sweet & Maxwell, 1983) at 538.
- 52 International Covenant on Civil and Political Rights, 1966 U.K.T.S. 6 (1977) Cmd. 6702; 61 A.J.I.L. 870 (1967).
- 53 Harris, supra n. 51 at 541.
- 54 Bhadauria, supra n. 1 at 131.
- 55 Ibid. at 132.
- 56 Bhadauria, supra, n. 1.
- 57 Richardson v. Mellish, (1824) 2 Bing. 229 at 252, per Burrough J.
- 58 Enderby Town Football Club v. Football Association, [1971] Ch. 591 at 606, per Lord Denning, M.R.
- 59 Re Drummond Wren, supra n. 41- the fear here seem to be about the ghettoization of religious groups.
- 60 S. M. Waddams, Study of Law ( 2nd ed. ) (Toronto: Carswell, 1983) at 17.
- 61 Re Drummond Wren, adopting the statement of 7 Hals. (2d) pp. 153-4.
- 62 Bhadauria, supra n. 1 at 126.

- 64 For example "discrimination" in the taxation of banking, see Alberta Bank Taxation Reference, [1939] A.C. 117.
- 65 Bhadauria, supra n. 1 at 194.
- 66 Gibson, supra n. 27 at 149.
- 67 Preamble to Ontario Human Rights Code.
- 68 Dworkin, supra n. 8 at 16.
- 69 Bhadauria, supra n.1 at 199.
- 70 Vicarious liability has been problematic for commissions for years. They have been unwilling to find liability unless the employer was somehow "condoning or consenting to" the incident. Francois v. Canadian Pacific Ltd (1988) 88 C.L.L.C. 17,003 ( *sub nom* Francois v. Cdn. Pacific Ltd) (Cdn. H. R. Trib.).
- 71 See Hinds v. CEIC (1988), 24 C.C.E.L.65, 10 C.H.R.R. D/5683 as noted in "Employer held vicariously liable for workplace racial harassment", by Christine Schmitz, Lawyers Weekly, Nov. 4, 1988, p. 1 and 19 The courts were more willing to find vicarious liability in terms of sexual harassment, but even there only where there some form of acquiescence on the employer.
- 72 C.A. Wright, A.M.Linden, & L.N.Klar (eds.) Canadian Tort Law (8th ed.) (Butterworth, Toronto, 1985) 6:18.
- 73 Bhadauria, supra n. 1 at 194. By "intention" what is meant is "an awareness or circumstances and desire of consequences or foresight that the consequence is certain to follow from the actor's conduct." G. Williams, supra n. 36 at 88.
- 74 Ibid. at p.90.
- 75 For that matter, even negligence for breach of statutory duty need not carry strict liability. Saskatchewan Wheat Pool v. Can [1983] 205 touches on this subject.
- 76 It is questionable whether this would be an "exception" to discrimination - it is an avoidance of discrimination.
- 77 Judge Linden in Aziz v. Adamson suggests that you could rely on the statute quite a bit to determine the boundaries. See Ian Hunter "The Stillborn Tort of Discrimination", (1982), Ott. Law Rev. 155.

78 S. 246.1 (2) of the Criminal Code R.S.C. , c. C-34. For a case on point see R. v. Hurd [1972] 2 O.R. (Ont. C.A.).

79 Stress is placed on the deterrent effect - making the actor totally responsible for making sure the other person was of age.

80 Problems of open violence arising from discrimination have been discussed in the media recently with regard to the difficulties between the Toronto police and parts of the black community. See generally Race Relations and the Law , Report of the Symposium in Vancouver B.C. 1982 (Minister of Supply and Services, 1983) . See also, J. Fleming, Law of Torts ,7th ed. (Agincourt, Ont: Carswell, 1987) at 303.

81 Bhadauria , supra n. 1 at at 199.

"It is quite a different thing to create by judicial fiat an obligation ( one in no sense analogous to a duty of care in the law of negligence) to confer an economic benefit upon certain persons, with whom the alleged obligor has no connection, and solely on the basis breach of a statute which itself provides comprehensively for remedies for its breach."

82 J. Fleming, The Law of Torts, 7th ed. (Agincourt, Ont.: Carswell, 1987) at 161.

83 T. Weir, A Casebook on Torts, 2nd ed. (Cambridge Press,Cambridge, 1970) p. 449.

84 Fleming, supra n. 82 at 161 .

85 Ibid. at 161.

86 Ibid. at 163.

87 Bhadauria , supra n.1 at 199.

88 For a good discussion of the topic see K. Cooper-Stephenson & I.B. Saunders, Personal Injury Damages in Canada , (Toronto, Carswell, 1981) at 91-96.

89 Recent cases have involved instances such as the competitor selected to go to the Olympics, but who was involved in an accident just prior to it and was compensated for that loss of opportunity and the death of 20th seed tennis competitor ( the prospect of making to Wimbledon or any other high level competition was seen as so remote as to foreclose any compensation for loss of opportunity.

It has been noted in Carson v. Willitts 65 O.L.R. 456 , [1930], 4 D.L.R. 977 (C.A.) that in such cases

...what the plaintiff lost ...was a sporting or gambling chance...It may not be easy to compute what that chance was worth too the plaintiiff, but the difficulty in estimating the quantum is no reason for refusing to award any damages.

Jurisdiction of a Board of Inquiry to award for loss of opportunity under the Ontario Human Right Code was recently turned down by Carruthers J. in York Condominium Corp. No. 216 v. Dudnik as reported in Lawyers Weekly, May 31, 1991, p. 18.

90 A.J.M.Milne, Human Rights and Human Diversity, (Albany: State University of New York, 1986) at 9.

91 Ibid. at 35.

## CHAPTER 8: FRAMEWORK OF THE TORT

### I. Introduction

Despite tort law's theoretical advantages in the area of human rights, some writers may suggest that judges are unlikely to become involved in this area of law without a practical framework within which to work. Some may argue that there is so much that could fall within the rubric of "human rights", the task would be fraught with vagueness and uncertainty. Without perceivable boundaries, expansion of judicial efforts in the area of non- Charter human rights may be seen as transcending legitimate activism. That same need for certainty and clarity affects each of us as we try to organize our lives according to the law.

Concomitantly, we are reminded that law will not compensate all losses. Academics tell us that shifting of loss will be justified only where there a reason for the defendant to bear it, rather than the plaintiff on whom it happened to fall.<sup>1</sup> Once again, it needs to be shown that there are borders between what will and what will not be compensated.

At the outset, it must be emphasized that there are very specific boundaries to both human rights and the tort law that would buttress it. This chapter considers a framework that can be set for torts in the area of human rights. Firstly, it is suggested that international law can be used to define and set boundaries of the human rights torts. Using the tort of

discrimination as an example, this chapter illustrates how international law can define terms like "discrimination". That same law can establish a starting point for categories of prohibition and offer precedents as a guide to interpretation.

This approach of relying on international law not only would be in keeping with the international obligations Canada has undertaken, but it could also respond to questions and issues that otherwise seem intractable. Often the "intractable" becomes less so when set against the standards of the larger international community, with the experience of that community serving to establish an understanding of what is "objectively" discriminatory.<sup>2</sup>

## II. The Tort of Discrimination

### A. The Matter of Definition

From time to time one encounters the argument that there is nothing per se wrong with "discrimination". Some people, relying heavily on "the authority of the dictionary",<sup>3</sup> would have us believe that "discrimination" is "nothing more than the expression of a preference".<sup>4</sup> Thus, discrimination, at worst, would be neutral in its effect, because the making of distinctions is the mark of individuality. But discrimination is more than merely making distinctions over personal characteristics<sup>5</sup> we like or dislike. To reduce it to this denotative meaning is to denigrate a term of art. If discrimination simply meant to differentiate, then discrimination might be more tenable. However, the differentiation becomes used as a justification to

ends detrimental to others. At that point, discrimination is no longer a neutral term.

For others, discrimination is more a procedural issue which fails to meet two criteria :1) the rules used to dispense rewards or penalties must be legitimate and 2) the set of standards used to dispense the rewards or penalties must be impartially applied.

From this perspective, it is maintained that the problem is not that "unwarranted discrimination" should be eliminated, but that there are problems in identifying such practices. Under this approach, the whole question becomes what constitutes an "unwarranted" distinction: "[i]n short, the key to understanding unwarranted discrimination lies in the establishment of valid selection criteria."<sup>6</sup> Putting aside for the moment the proposition that this is an excessively narrow definition of discrimination that ignores historical imbalances,<sup>7</sup> the proposition, nonetheless, poses a serious consideration-- that in looking for criteria there is the need for an objective standard, one that lies beyond personal morality. It is argued in this chapter that the objective standard already exists. It comes from the community and included in that definition of "community" is the international community.<sup>8</sup>

Through covenants, treaties and declarations the international community has provided not only a definition of what discrimination is, but also provided specific examples of situations within which it can objectively be seen to be operating. As previously mentioned, at international law



"discrimination is defined as occurring when in a given case no sufficient connection exists between the equality or inequality aspects on the one hand and the nature of the treatment on the other." Sufficient connections exist only where the classification is relevant to the subject, fairly related to it, not capricious or arbitrary, but instead reasonable and just.<sup>9</sup> The distinction must be "real and substantial" and that classification must be relevant to the objects.<sup>10</sup>

Internationally, over the last few decades, communities have had to tackle this question of definition. The European Human Rights Court has established that discrimination occurs and the principle of equality of treatment is violated if the distinction has no valid objective or reasonable justification.<sup>11</sup> The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration and regard is given to principles which normally prevail in democratic societies. This must not only pursue a legitimate aim, for the article is also violated when it is not clearly established that there is no reasonable relationship of proportionality between the means employed and the aim to be realized.<sup>12</sup>

At international law, it has been noted that discrimination may be "wrongly equal or wrongly unequal treatment"<sup>13</sup> which, in turn, is to be judged in relation to the nature of the subject matter regulated.<sup>14</sup> "[I]t therefore would be inappropriate to try to reach a decision concerning the occurrence of discrimination without an examination of the subject matter regulated."<sup>15</sup>

Within the international definition of the term, the non-discrimination principle must be regarded as implying not only formal equal treatment but also the attainment of material equality. Accordingly, non-discrimination is not only a matter of equal treatment of essentially equals, but also of unequal treatment of essentially unequals.

To assist in the determination of "wrongful unequal treatment" the international documents enumerate prohibited grounds of discrimination. Both the Universal Declaration and International Covenant of Civil and Political Rights, for example, set out race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status as prohibited grounds. In that the international obligations establish specific explicitly prohibited grounds of discrimination, this definition of discrimination creates the necessary objective, community-based standards.

Each category of prohibition represents that which was perceived at the time of the drafting of the international document as a particularly problematic area. At the same time, each category of prohibition also reflects a fundamental and underlying principle: the unreasonableness of the distinction with respect to the treatment. In each instance there is a lack of sufficient connection between the inequality and the nature of the treatment. It is this principle which offers tremendous potential for expanding prohibited grounds of discrimination in tort law past the inequities of any particular decade.

International bodies also recognized that there could be other similar situations (or "statuses") that would not meet the test of "sufficient connection". Today, the necessity of "sufficient connection" offers the prospect of establishing other prohibited grounds, including marital status, criminal arrest or conviction, family relationship, sexual orientation, and source of income. In so much as "status" is defined as "state, condition or relation", both physical and mental disability would be covered, as would age.

### III. Use of International Law to Meet Canadian Division of Powers Problems

For the Canadian judiciary, reliance on basic international minimums can effectively serve several objects. First, it partially resolves the jurisdictional problems that Canada has had up to now, a problem which has prevented Canada from internally implementing the international obligations to which the country has committed itself.<sup>16</sup> It also avoids the political myopia of time and place. It recognizes criterion external to Canada in which personal or particular social morality become irrelevant: each must obey the law. Equality and non-discrimination no longer become matters of tolerance. Reliance on international instruments by the Canadian judiciary is not entirely novel. It has been used in common law cases in the past<sup>17</sup> and is becoming progressively more significant with the advent of Charter of Rights and Freedoms.<sup>18</sup>

#### IV. Elements of the Tort of Discrimination

Academic writers have established a framework to examine and explain curial decisions for actions, looking at duty of care, breach, heads of damage, remoteness, factual causation, complete defences, apportionment and measure of damages. It has been pointed out that substantial gaps in any one of the requirements may lead to rejection of the case by the courts.<sup>19</sup> Drawing upon that framework, this chapter sets out the most likely shape a tort of discrimination would take.

##### A. Necessary Level of Fault for the Tort

Strict liability, negligence, and intentional actions operate as three overlapping standards for the degree of fault required in an action of discrimination. Of these, prima facie, intentional incidents of discrimination would probably be the ones that the courts would acknowledge most readily. It is also the one for which the courts probably would be most willing to award punitive and aggravated damages. Having intended to harm the person, the actor would readily be held liable because deliberate injury is usually devoid of all social utility. At the same time, excepting some intervening social policy, one is held responsible for the harm one causes.<sup>20</sup> Thus, the usual limits on freedom of action have been met.

### 1. Limitations of the Intention for Tort Liability

There are numerous problems with relying solely on an intentional basis for the anti-discrimination action though. The type of legal "intention", here, means more than just intending to act,<sup>21</sup> it refers also to "intending the adverse consequences". Few discriminatory actions can be seen to fall into this category. More often than not, discrimination occurs not out of malice, but out of routine, tradition, a particular view of economics, paternalism, or simply not thinking.<sup>22</sup>

Indeed, human rights advocates consistently have stressed that adherence to a concept of "intention" has seriously hampered the effectiveness of human rights laws.<sup>23</sup> By focussing so strenuously on the mental state of the actor, this form of fault shifted attention from the consequences to the victim.<sup>24</sup> Reliance on intention also made it hard to call into question policies and practices that appear neutrally motivated but where the exclusionary consequences on the others are nonetheless real.<sup>25</sup>

Additionally, the concept of intent has been recognized as producing a series of almost insuperable factual difficulties, with individual cases becoming bogged in the vagaries of finding the intention.<sup>26</sup> However, to overcome this it might be argued that proof of differential treatment constituted relevant and important evidence from which intent could be inferred.<sup>27</sup>

Consequently, it would appear that focussing on the actor intending certain consequences limits the usefulness of the approach. Even if intention was expanded to include a form of recklessness<sup>28</sup> (which is to say, not caring about the con-

sequences of the action), it would still have very limited application.

Recognizing these drawbacks, attempts have been made to expand the definition of "intention". The interpretation has shifted so that "...intentional discrimination was meant to denote either that the respondent desired to cause a disadvantage to a protected group or that he was conscious of the fact that such a consequence would result from his actions."<sup>29</sup> This meaning was sufficiently broad to include both discrimination based on malice or evil motives and discriminatory acts which were motivated by neutral or even positive considerations but which were known to cause a disadvantage to a protected class.<sup>30</sup>

It may be necessary to consider other than intentional harms for more than just these reasons. For one thing it is felt that to apply a single method of analysis for all forms of discrimination would only compel parties to gloss over relevant, but complex, issues.<sup>31</sup>

## 2. Strict Liability

At the other end of the spectrum of fault lies strict liability. This would see any "discriminatory" act, as defined by the courts, as automatically leading to liability. No intention to discriminate would be necessary here. However, as discussed in Chapter 7, here the problem is that strict liability is usually seen as entailing unduly severe consequences to potential defendants, with the substantial restriction on activity. The response to strict liability typically is a fear that this would impose

an undue burden and tend to discourage enterprise. In response, the courts may read the concept of "discrimination" or the scope of the prohibited grounds in such a narrow fashion that effectively negates any substantive remedy. Thus, strict liability is unlikely to take a significant place in establishing a tort of discrimination unless it can be shown to the courts that the harm caused by discrimination is sufficiently grave to merit the more onerous level of liability.

### 3. Negligence

In light of the limitations of both strict liability and intentional torts, it is posited here that the most fruitful area for a tort of discrimination may be that of negligence, where negligence is defined as occurring where the defendant has failed to live up to an objective, community-based standard of what is reasonable.<sup>32</sup> In comparison to intentional injuries, curial protection against unintended harms are typically more modest. This is because greater weight is given to the countervailing interest of the defendant in freedom of action. There will always be a limit on that freedom when it exceeds boundaries set by the community.

The question at this juncture becomes what that community standard should be. Typically, the "common law" is considered as "backward looking" and conservative, pronouncing only on what society has already strongly accepted as reasonable in practice. This view sees the common law as following public opinion, not

leading it. For that reason "community" should not be limited to the regional criterion.

Alternatively, in the search for community standards an easy choice for the judiciary would be reference to elements common throughout the human rights legislation. The drawback to this approach is that applying it only to grounds uniformly found throughout Canada would effectively limit the actions to the four prohibited categories: race, sex, physical disability and colour. This is far too narrow to be an accurate representation of community standards, Canadian or otherwise, let alone common morality.

Another choice would be to rely on any ground that existed in any province's legislation. While this course would certainly attach a certain "legitimacy" to the judge's activism and certainly could be considered evidence of "no sufficient connection", the drawback to this approach is that the tack is subject to the political suasions of particular interest groups. To focus solely on those quite legitimate exercises of power may leave by the wayside other equally legitimate claims heretofore unsuccessful in political pressuring. At the same time, actions tied to "what is" fall prey to the spectre of being tied to a particular time and place.

Instead, it becomes more important to turn to an underlying principle<sup>33</sup> such as "sufficient connection", as previously discussed, without explicit regard to categories and then use policy considerations as a restriction on the duty.



## B. Duty of Care

The framework of any tort requires consideration of duty of care. As has already been shown part of that duty flows from the definition of discrimination: the duty being owed whenever there is an action that causes inequality of treatment and the action is tied to a prohibited ground of discrimination. Admittedly, this is an exceptionally wide application of the duty concept. Consequently, it will need to be narrowed by policy considerations:

### 1. Duty of Care and Policy Implications

Social policy question asks whether given an acceptable proximity, there is any good reason why the damages remedy is not appropriate and just in the general type of circumstances involved." 34

Typically, liberal philosophies have assumed a wide freedom of action for the individual, upon which intrusions upon that freedom were substantially limited. Personal preference was wide under this view. Human rights legislation, to date, has been careful to preserve a significant portion of that personal preference,<sup>35</sup> for example, by exempting "discrimination" in respect of accommodation where the people would be sharing the same house or in employment of farm employees who share accommodation with the employer and in the employment of domestic staff.<sup>36</sup> Ostensibly, because the person would be

sharing part of the private life of the other people, it has been seen as appropriate to allow "discrimination" in these areas.<sup>37</sup>

Within a community-based perspective the private realm within which "discrimination" is permissible becomes more narrow. In contrast to there being discrete "public" and "private" spheres of action, here all life takes on social responsibilities, with exceptions perhaps being restricted to opinions, beliefs, and to selection of friends. "Permissible discrimination" may exist with respect to opinion and belief, not necessarily because it is acceptable but because pragmatically it is difficult (if not impossible) to control either of these. Where actions occur within the commercial (and obviously public) arena personal preference must give way to non-discrimination.<sup>38</sup>

## 2. The Distinction Between Policy and Definition

Exemptions from the prohibition of discrimination have been legislatively allowed for a variety of reasons. In some provinces people in "sheltered workshops" may be treated differently by receiving a lower wage. Legislative exemptions from non-discrimination in employment also are given for non-profit groups operated to foster the welfare of a specific group.<sup>39</sup> Typically, this is seen as a policy of helping disabled people gradually integrate into the work force. Sometimes allowances are made for religious or ethnic groups, other times for philanthropic or social organizations.

Under a tort action none of these need necessarily be an incorrect approach, but the manner in which that conclusion is

reached will be somewhat different. For example, refusal to accommodate in the family home someone that one does not like for racial or religious reasons may be discrimination, but it would be balanced against a right to privacy. In this regard, right is balanced against right.

As a second example, the fact that a sheltered workshop by providing work experience for the employee is operating for "rehabilitative" as opposed to "commercial" purposes, offers the necessary "sufficient connection" between the discrimination and the treatment so as to accept the treatment as not discriminatory. However, should the work in all essential respects resemble "regular employment" (but without the same benefits), that lower wage would constitute discrimination that would be actionable.

Consider, also, certain non-profit groups operating for the enhancement of specific religious, racial or philanthropic goals: in such circumstances religion, creed, colour or national origin attention to a particular religious or language qualifications might be considered reasonable and justifiable occupational requirements and once again meets the "sufficient connection test".<sup>40</sup> In these senses this is differential treatment, but it may not fit within the definition of discrimination.<sup>41</sup>

However, situations such as that existing under Newfoundland's Code s. 6 (a) which in respect of the particular charitable, religious or similar non-profit group could make no explicit reference to occupational requirements, under a tort action, be seen as discriminating to the extent the "sufficient connection"

was lacking.<sup>42</sup> While these allowances may be part of a policy to help advance minority goals and pluralism, without that "sufficient connection" the policy cannot be seen as justifiable.

### 3. Restricting Policy Exceptions

Because it is a restriction of what would otherwise be the other person's right to equal access to employment opportunities, each "exemption" or "exception" must be read narrowly. Even if operated for "non-profit" and for the advancement or enhancement of the group goals (often within minority group sphere), the groups having entered into the commercial sphere (or conversely moved beyond the private sphere) by such things as renting their facilities, should be held to the same responsibilities as all other people.

As one example of where exemptions should be read restrictively, consider an experience common in American human rights literature- the refusal of Rotary or Kiwanis club branches to allow women into the chapter. On one hand, here we have a "fraternal association" that stresses the need for male camaraderie and choice of friends. The clubs also provide invaluable business connections for members. To deny women or any other group access to those social and business contacts effectively reduces their edge in the marketplace. At the same time, it is difficult to consider a chapter with three thousand members as still being in the private sphere. Consequently, irrespective of whether this is non-profit fraternal organization,

the need for equal treatment would severely constrict allowable differential treatment within fraternal organization.

### C. Breach of Duty

The question here is whether the defendant's conduct fell below the standard of the reasonable person or reasonable institution.<sup>43</sup> It is normally pointed out that in considering whether there has been a breach of duty, it is important to look at the impugned action or inaction. The plaintiff's rights are then balanced against the burden of eliminating or minimizing the risk coupled with the demonstrably justified social utility of the defendant's conduct.<sup>44</sup>

Specification of the action to be impugned is important because in an intentional tort there is no competing interest of the defendant. An intended harm is antisocial.<sup>45</sup> In negligence, in contrast there is concern is that we may be unduly burdening legitimate activity .

Consider, for example, wheelchair access to the workplace. Modifications to the workplace can be so costly to the employer that she may have to "discriminate" in the employment of some disabled in order to keep the business afloat. There is, however, a question on whom the burden of showing the feasibility of reasonable accommodation lies on the complainant or on the respondent to show that such an accommodation was impossible short of undue hardship. The Supreme Court of Canada has taken the view that the responsibility lies with the employer, as the employer is in possession of the necessary information to show

undue hardship-- stuff that is short of undue interference in the operation of the business and without undue expense to the employer. Breach of duty also considers how a "reasonable person " would act. Typically in negligence actions, we rely on the general practice of "the reasonable employer", to see if the reasonable employer would have acted in a particular way. Conceivably, we may run into difficulties with that approach in a tort of discrimination. It may be seen as maintaining the status quo. If many employers in an area did exactly the same thing, e.g. discriminated against hiring women full-time because they "might get pregnant", the behaviour might seem reasonable to the business community.

However, the standard lacks empirical objectivity. For that reason, it is necessary to turn to a more objective criterion, that of a "sufficient connection" between the aspect of inequality and the nature of the treatment. Once again sufficient connections will be those that are relevant, rationally and fairly related to the object, reasonable, just, and not capricious or arbitrary.

#### D. Damage

The question here is whether the type of damage is actionable? Once again the categories of compensable damage are going to be heavily dependent on the facts of the case. It may include injury to dignity, loss of wages, economic loss-- any of the variety of kinds of damage. Where there is outrageous conduct, punitive or aggravated damages may also be appropriate. Indeed, serious consideration should be placed on treating

discrimination, in and of itself, as a harm or injury without any other damage being proved. This section addresses only a few of these.

With regard to "loss of dignity", it has been contended that liability cannot be extended to cover "every trivial indignity":

There is no occasion to intervene with balm for wounded feelings in every case where a flood of billingsgate is loosened in an argument over a back fence... 46

Instead, it has been argued that there should be liability only for conduct that exceeds all bounds usually tolerated by society:

[The action should be] of a nature which is especially calculated to cause and does cause mental damage of a very serious kind. 47

Arguably, the existence of international censures for discrimination demonstrate that even these onerous requirements have been met, and the harm caused by discrimination exceeds the bounds tolerated by society.

Nevertheless, injury to dignity runs into a problem of proof of damage. In that dignity is assumed to be principally an internal feature, how does one prove damage to one's dignity? In some places, for example the United States, the view is gaining ground that the enormity of the outrage itself may sometimes carry conviction that there has in fact been a severe emotional shock, neither feigned or trivial, so as to dispense

with the proof of physical injury as a guarantee of the genuineness of the plaintiff's claim. 48

Similarly, in other instances it may be appropriate to assume by the nature of the act that damage has occurred. Certainly, under the British Columbia Civil Rights Protection Act the violation, itself, is considered a tort without proof of damage. Similarly, in other tortious situations damage is assumed to flow from the act. In this light, a minimum level of damages could be set for any act of discrimination .

#### E. Factual Causation

In respect of factual causation the question becomes

whether as a matter of scientific or philosophical fact the defendant's breach can be said to have caused the plaintiff's infringement and whether consequential damage was the result of the infringement. 49

Typically, what is of concern in factual concern is that there is a connection; that "but/for" the discrimination, the adverse consequences would not have followed. The most narrow approach would be to require to direct causal link between the discrimination and the consequences; and that was the direction taken in the Ekco Canada case, where the Quebec Superior Court required a direct causal link between the exclusion and the religious beliefs of the complainants.<sup>50</sup>

Because in these areas people do not act with one motive, the "but/for" route may be inadequate in actions for discrimination. A person may be fired for her job not only



because she is a woman, but also because she is seen as too "aggressive". Recognizing this, Canadian commission cases on discrimination have generally avoided the "but/for" test. It is widely recognized that in order to establish a causal relationship the discriminatory element need not be the only cause, nor must it be the major or main cause. It is sufficient that it be an "operative element" in the decision that is alleged to be discriminatory. By way of example: the fact that a person is member of trade union, plus is quick-tempered, is aggressive, and is prone to foul language (each adding to the termination of employment) would not preclude a legitimate finding of discrimination on the basis of trade union membership.<sup>51</sup>

The reason for this is that the person is equal in dignity and human rights, without regard to race, colour, religion, national origin. That purpose would not be served if these factors could be validly considered, merely because they are in conjunction with other legitimate factors.<sup>52</sup>

#### F. Remoteness

Under this head several issues arise:

Was the plaintiff or the damage or loss considered sufficiently closely linked to the defendant's conduct to be recoverable. Here the considerations are 1) plaintiff proximity 2) proximity of damages 3) intervening causes 4) post-infringement events. <sup>53</sup>

Of these, only plaintiff proximity will be touched upon at present. Here, there arise questions of whether a victim must be a member of a protected group in order to have recourse

under an anti-discrimination action or whether third parties are entitled to a remedy where decisions affecting them are related to a prohibited ground.<sup>54</sup> Consider, for example, whether a person dismissed for not following the discriminatory policy of an employer<sup>55</sup> or person penalized because she associates with a protected class member (inter-racial marriage) should have legal recourse under a tort of discrimination. Although not directly discriminated against herself, she certainly faces the adverse consequences of it. Certainly, human right boards normally view these actions as illegal and subject to remedies under the legislation, basically because the objectives of human rights otherwise would not be served.

#### G. Complete Defences

Another important consideration for the framework of a tort of discrimination is

whether despite satisfaction of the other elements of the claim there existed circumstances giving rise to a defence which completely excuses the payment to the plaintiff. 56

Human rights literature has directed considerable amount of attention to the issue of defences to claims of discrimination. In the literature, distinctions are typically drawn between defences applicable to direct discrimination and those for adverse effect discrimination. Writers suggest that the two should be different because the two theories of discrimination surrounding them are conceptually different.<sup>57</sup>

Consider direct discrimination: "The purpose of a defence under direct discrimination is to demonstrate that a group classification which is directly based upon one of the prohibited grounds...is justified and necessary for the safe and efficient operation of the business, irrespective of individual merit."<sup>58</sup> Thus, a position in railyard that purports to preclude diabetics because of the possibility of insulin reaction on the job might fit the requirements of direct discrimination.

On the other hand, the 'business necessity defence' seeks to justify a facially neutral business practice such as Saturday shift requirement or an aptitude test. Under this defence the goal is to demonstrate that despite its adverse effect upon a protected group the practice is essential to the business. The abilities of individual group members are completely irrelevant to a determination of business necessity.<sup>59</sup>

On one level one wonders if there should be defences available, that is to say that having failed to meet the sufficient connection test, any further allowance should be made. Nevertheless, the defences are now under present human rights legislations.

### 1. Defences to Direct Discrimination

Over the years human rights commissions have developed defences to direct discrimination. Three presently considered are:

a. Proof that the act was based only on a legitimate, non-discriminatory reason, such as personality conflicts. However, as mentioned earlier under causation, the discrimination need not be shown as the only cause of exclusion to negate the defence. What if the defendant offered as an excuse for refusing accommodation to those on social assistance the explanation that he wanted to assure that he had good, paying tenants. The problem here is that a landlord, in reasonably wanting to get paid may, in one respect, be using a "non-discriminatory reason". At the same time, the landlord's assumptions may be based on erroneous stereotypes about people on welfare. It may be suggested that once a prima facie discrimination has been shown, the burden then lies on the defendant to refute that.

b. Proof that the case falls within one of the exclusions or exemptions. Under this heading, discrimination in single family dwellings is the common example. As shown earlier, some of these will not be "discrimination " because, by definition, there exists sufficient connection between the aspects of inequality and the treatment. Some of these exclusions function as limits on the right to non-discrimination in that they reach into other rights. However, as exceptions these rules should be read restrictively .

c. Proof that the exclusion is justified under the "bona fide occupational requirements" exception (BFOR). One must be careful with terms such as BFOR.<sup>60</sup> To be a BFOR it "must be honestly, in good faith and in the sincerely held belief that such

limitation is imposed in the interests of adequate performance of the work involved with all reasonable dispatch, safety and economy". Typically, we assume "bona fide" to mean that which is not ill-willed and we twin it with concepts such as "good faith." Yet if good faith and the issue of motive were rightly put aside in the discussion on intentional discrimination, to re-introduce an element of motive via an affirmative defence appears incongruous. "Indeed a subjective approach appears incongruous when dealing with a concept which is essentially objective in character, where the respondent's state of mind has little to do with a finding of illegal discrimination and where it is the effect upon the victim or group, rather than the desire to punish the discriminator, which is said to be of the utmost concern." 61

While boards have often relied upon a combination of subjective and objective criteria (with the objective ones holding primacy), 62 case law has also shown that strictly objective criteria can (and perhaps should be) employed in ascertaining what is a BFOR. 63

In Malik v. Ministry of Government Services 64 the board said once disproportionate impact is shown, the employer must show not only that the impugned device (for example some mechanical aptitude test that is used as an entrance requirement) produces employees with the job-related qualities required, but also that the test is the only way of selecting such employees. 65

While this level of proof would go far to combatting discrimination, it may be seen as unduly onerous to the defendant, in that he may not have the money or the expertise to critically assess the tests he utilizes in screening applicants. Consequently the courts, too, may tend to give some legitimacy to subjective beliefs that a particular procedure, requirement or qualification produces the desired kind of employee.

However, what case law has stressed is that "in addition to the characteristics of good faith and honestly held belief, BFOR must also be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public."<sup>66</sup>

The need for job requirements to be objectively related to the position accomplishes much getting away from generalizations, suppositions, faulty assumptions that flow from stereotyping and prejudice. Because it is on a factual basis, the information forces the employer to move from "impressions" to thinking about what exactly she or he wants in an employee.

## 2. Defences to Adverse Effect Discrimination

At present, the defences to adverse effect discrimination are rebuttal evidence and justification. Technically, rebuttal evidence is not a nominate defence. Instead, it is simply proof that the adverse effect claimed does not exist in fact .

In respect of "the business necessity defence", this is an objective standard determined by necessity, not by convenience to the employer.<sup>67</sup> In order to explain the concept of "business necessity" consider the following: If an employment regulation seems neutral on its face (applying equally to all prospective employees) but has the effect of excluding certain groups (e.g. women) under present interpretations it will still be valid if the regulation is in good faith and "reasonably necessary in all the circumstances" to the employer's business.

There have been some attempts to use a rather subjective test interpretation of what constitutes "justifiable" under the business necessity defence. E.g. "if a person produces reasons for doing something which would be acceptable to right-thinking people as sound and tolerable reasons for doing so, then he has justified his conduct. " However, some have suggested that this reading would amount to reading the prohibition of indirect discrimination out of existence.<sup>68</sup>

Other readings such as business convenience as opposed to necessity similarly whittle away the equality rights. Reasons of hygiene or safety are often explanation for excluding certain groups. For example, chocolate factories may have a no beard policy for reasons of hygiene. This rule, however, would effectively preclude baptized Sikhs males from working there. If we look only to some business reason, without examining the feasibilities of less discriminatory alternatives, the test becomes more one of business convenience than of business necessity, with the party subject to the adverse effect discrim-

ination losing out again.<sup>69</sup> It would appear that any tort of discrimination must look to a proportionality between the ends and the means to the end.

#### H. Conclusion

Without specific factual circumstances, a detailed framework for a tort of discrimination becomes difficult to formulate, but some possibilities have been suggested here. Negligence, by which is meant failure to live up to the standard of conduct expected by the community writ large, offers promise. That definition of discrimination, itself, forms the duty and the defences.



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 CHAPTER 8 FOOTNOTES

<sup>1</sup> John G. Fleming, The Law of Torts, 7th ed.(Agincourt, Ont: Carswell, 1987) at 3:

"The hypothesis is that the loss has already occurred and what ever benefit might be derived from repairing the fortunes of one person is exactly set off by the harm caused through taking that amount from another. The economic assets of the community are not increased... True while security and stability are generally accepted as worthwhile social objects, there is no inherent reason for preferring the security and stability of the plaintiffs over the defendants. Hence, the shifting of loss exists only when there is a special reason for requiring the defendant to bear it rather than the plaintiff on whom it happens to fall."

<sup>2</sup> Consider the difficulties within Quebec where nationalist desires are pitted against the needs and rights of those outside the French culture.

<sup>3</sup> Indeed Funk and Wagnall Dictionary, inter alia, defines discrimination as: a) the drawing of a clear distinction; distinguishing b) the drawing or constituting a clear distinction between; differentiating c) recognizing as being different.

<sup>4</sup> W.E. Block and M.A. Walker in Discrimination, Affirmative Action and Equal Opportunity, Block, W. and Walker, M. eds. (Fraser Institute: Vancouver, 1981) at p. 6.

<sup>5</sup> Ibid.

<sup>6</sup> Some use the term "illegitimate discrimination", but this too is an oxymoron.

<sup>7</sup> See its use in this fashion in L. Roberts' article, "Understanding Affirmative Action", in Discrimination, Affirmative Action and Equal opportunity, supra, n. 3 at 155. Roberts and the editors of the book apparently look only to individual discrimination (as opposed to systemic discrimination). Their responses do not cover historical imbalances, and summarily dismiss affirmative action.

<sup>8</sup> A question remains whether there is an objective standard (a standard that lasts for all times ) of what constitutes discrimination even in the international community. Or, instead, has even that

international standard been changing. As well can there be room for a subjective element in addition to the objective facets of the standard ?

9 E. W. Vierdag, The Concept of Discrimination in International Law ( The Hague: Nijhoff, 1973 ) p. 61.

10 Ibid. at 64 and 111.

11 Belgian Linguistics Case ( Merits) as reported in D.J. Harris, Cases and Materials on International Law p. 526-528.

12 Ibid. Because we are dealing with the European Convention There is the problem of each instrument having its own limited goals and ends, which may limit its ability as a principle for extrapolation.

The question must always be whether there a way of achieving the same ends with a lesser burden on the minority. Unfortunately, there seems to be shift away from this kind of thinking recently by the S.C.C. in McKinney v. University of Guelph (Dec. 6, 1990.) [1990] S.C.C.D. 4126-01. McKinney was a university compulsory retirement case under the Charter. The majority of the court declined to examine the rights of the those over 65 in a way that might lessen the burden on the seniors and looked only to whether the university's policy was a "legitimate aim".

13 There can also be wrongly "equal" treatment as well, where unequals are treated equally. The treatment is exactly the same for all persons, even though there may not be "equality in fact". The latter is a term often applied to compensatory unequal treatment of unequal in order to reach equal social conditions- so as to achieve an equilibrium between different situations. Vierdag, *supra* n. 9 at 55.

14 Vierdag, *supra* n.9 at 61.

15 Ibid. at 111.

16 In the European Convention Case of Abdulaziz, Cabales and Balkandali, (15/1983/71/107-109) Judgment of the European Court of Human Rights, the fact that England had not implemented the Convention put the country in violation of the right to an effective remedy. H.M. Kindred, J.G. Castel, W.C. Graham et al eds. International Law : Chiefly as Intrepreted and Applied in Canada 4th ed. ( Toronto: Edmond Montgomery, 1987) at 693.

17 E.G. Mackay J in Re Drummond Wren, [1945] O.R. 778 referred to the U.N. Charter, the Atlantic Charter and statements of various world leaders condemning racial discrimination as a means of defining " public policy" for the purposes of striking out a restrictive covenant which prohibited the sale of land "to Jews or persons of objectionable nationality".

In Re Alberta Provincial Employees and the Crown, Sinclair C.J.Q.B. extensively reviewed the I.L.O. Conventions in order to consider whether the Alberta statute prohibiting the right to strike violated Canada's international obligations. (However, he concluded there was no such customary rule established at international law).

In Seneca College v. Bhaduria, (1979) C.C.L.T.121, the Ontario Court of Appeal referred to the international instruments as a way of defining a tort of racial discrimination. The view was rejected by the Supreme Court of Canada on the grounds that an unimplemented agreement (the Universal Declaration) could not create independent rights at common law. That argument loses strength in light of subsequent documents Canada has signed-eg. International Covenant of Civil and Political Rights. This was in force in Canada by 1976. By December 1981 there were 69 parties as signatories to it.

As well, some view the Universal Declaration as binding on the members of the U.N. because 1) they have expressly accepted its obligations under the UN charter Art.55 and 56; 2) it now constitutes a legitimate interpretation of Art. 55 (c) of the UN Charter; and 3) the Proclamation of Tehran (1968) adopted by the representatives of 84 states to review the progress made in twenty years since the adoption of the Declaration and to formulate a program for the future, have made it so. ( All this from Kindred, supra n. 16, at 644).

18 Especially with respect to section 1.

19 G. Williams, Foundations of the Law of Tort (Toronto: Carswell, 1976).

20 John G. Fleming, The Law of Torts, 7th ed. ( Agincourt, Ont: Carswell, 1987) at 4.

21 For an intentional tort it does not mean intend to act (that would be overly broad) and indeed boards have said that intending to fire is not sufficient to show discrimination. Beatrice Vizkelety, Proving Discrimination in Canada, (Toronto : Carswell, 1987) at 63.

22 Vizkelety, *ibid.* at 134-139 and 2. Relying on " intending the adverse consequences" also came from the previous quasi-criminal approach which required proof of mens rea.

23 Vizkelety, *ibid.* at 40.

In Bhinder and the Cdn. Human Rights Comm. v. C.N.R. 7 C.H.R.R. D/3093 at 3106., the S.C.C. also saw it as an "insuperable barrier" to hold that intent was a required element of discrimination. See also Vizkelety, at 52 .

24 The early human rights commissions interpretations were founded on the requirement of intent-- findings of violations depended on a motive or an ill-will. This came from a belief that tended to "associate discrimination with ill-willed behaviour caused

by bigotry, prejudice and intolerance, an attitude which was common following World War II, but which persists to today." It became apparent that there were serious problems of proof in looking to the respondent's state of mind at the time of the refusal. Beatrice Vizkelety, *supra* n. 21 at 2.

25 *Ibid.* at 2.

26 Blumrosen, "Strangers in Paradise: Griggs v. Duke Power Co and the the Concept of Employment Discrimination" (1972) , 71 Mich L. Rev. 59 at 68.

27 Vizkelety, *supra* n. 21 at 38 referring to approach used in MacBean v. Village of Plaster Rock( N.B. 1975) and Mitchell v. Nobilium Products Ltd. (1981) , 3 C.H.R.R. D/641 ( Ont. Bd. of Inquiry).

28 Defendant in Wilkinson v. Downton [1897] 2 Q.B. 57 did not necessarily want to harm the plaintiff, just intended to have fun, but he acted in a sense that was basically reckless.

29 See to some extent Action Travail des Femmes v. C.N.R., [1987] 1 S.C.R.1114 , and Waplington v. Maloney Steel Ltd.(1983) 4 C.H.R.R. D/1262 ( Alta. Bd. of Inquiry); affirmed (1983), 4 C.H.R.R. D/1483 (Alta. Q.B.) In Waplington there was a lack of washroom facilities so the company stated it couldn't hire women; company's knowledge of its reasons was sufficient for board to conclude that there was intent to discriminate.

In Action Travail , the fact that the railway company knowing that its hiring practices were having a negative effect on the employment of women was sufficient to take it into intentional. It could not be said that the hiring practices were purely accidental.

30 Vizkelety, *supra* n. 21 at 72.

31 Vizkelety, *ibid.* at 2 and W. Black, "From Intent to Effect: New Standards in Human Rights" (1980), 1 C.H.R.R. D/1 at 1.

32 "It is now legitimate to suggest a unification of almost all claims in respect of conduct which is objectively unreasonable under the tort of negligence, while harm caused by intentional conduct can be collected under the single umbrella of the tort of intentional interference by unlawful means. " See K. Cooper-Stephenson, Tort II Casebook, College of Law, University of Saskatchewan, 1988) [unpublished] p. 17.

33 There are other possibilities such as "immutable characteristics" such as race or sex. However, this would not protect religious belief as it can be changed.

Another possibility might be characteristics that cause a widespread problem, but there is no convincing reason why the

extent of a problem, alone, should be determinative of what constitutes "discrimination".

34 Cooper- Stephenson, *supra* n. 32 at 15.

35 It must be noted that, overall, even in legislated measures, what constitutes "private" has been significantly narrowed over the last few decades.

We see this public-private dichotomy in s. 12 of the Saskatchewan Code where one cannot deny to a person accommodation, services, or facilities "customarily admitted or offered to the public".

36 R.S.A., 1980, c. 12, s. 9. S.P.E.I. 1975, c. 72, as am. s. 6 (4) (a) is typical of the domestic staff provision. Some provinces do not seem to have deemed this as necessary for farm workers, which makes one question the legitimacy of the foundation.

37 In a sense this may be a policy decision. It may have been that the risk of violence in "forcing" people together in such intimate circumstances override any potential benefits. One should question the validity of these exemptions for, having decided to enter into the commercial or public sphere by renting or employing, the person may have removed himself from the private sphere.

38 As the Canadian Human Rights Commission noted, no one's freedom can exist to the extent that it effectively wipes out the rights of others. The reason for this in the commercial sphere may rely on a Drummond Wren type of argument- With respect to restrictive covenants there would be ghettoization. In other areas the adverse consequences to the discriminated in areas such as services could make even day to day living unbearable.

39 E.g. section 4 of the Nova Scotia Human Rights Act S.N.S. 1969, c.11 as am.

40 See Ontario's Code S.O. 1981, c. 53, s. 4 (4) (b).

41 Consider the divorced Catholic teacher in the Catholic school system, other divorced teachers were allowed to teach but they weren't Catholic.

42 Actually, it is extremely embarrassing that we should allow a "philanthropic" or "charitable" or "educational" group (each which carry positive connotations) to deny rights to others.

43 Cooper- Stephenson Casebook, *supra* n.31 at 15.

44 Ibid.

45 Fleming, *supra* n. 1 at 30.

46 Fleming, *supra* n. 1 at 32 is quoting from Prosser and Keaton 59-60 Restatement 2d §46 "extreme and outrageous conduct".

47 *Ibid.*

48 Fleming, *ibid.* at 32 referring to Prosser & Keeton Restatement §246: "Insult and Outrage" (1956) 44 Cal. L.Rev. See too, M. Handford, "Threatening or Insulting Words"(1976) 54 Can. B. Rev. 563.

49 Cooper-Stephenson, *supra* n. 32 at 16.

50 Vizkelety, *supra* n. 21 at 54 . Certainly the Quebec Charter, itself, does not seem to require this. The Quebec Charter, instead, defines discrimination as actions that have the effect of nullifying or impairing the right. The case was to go to the Quebec Court of Appeal. Cite for the case Comm. des droits de la personne du Que. c. Ekco Canada Inc. (1983) 4 C.H.R.R. D/1787.

51 *Ibid.* at p.79 referring to Bushnell case which is really a labor relations case (1974) , 1 O.R.(2d) 442 (Ont. H.C.).

52 Vizkelety, *supra* , n. 21 at 81 referring to MacBean v. Village of Plaster Rock

The other consideration here is one of stereotyping--whereas strength of character and independent thinking in a male may be considered admirable qualities, in a female the same characteristics may be treated as the woman "coming on too strong."

53 This analysis has been used for Charter claims by K. Cooper- Stephenson , Charter Damages Claims, ( Calgary : Carswell, 1990) at 266.

54 Vizkelety, *supra* n. 21 at 83.

55 Showboat Entertainment Centre Ltd. v. Owens [1984] 1 I.R.L.R. Similarly, Zarcznska v. Levy, [1979] 1 All E.R. 814.

56 Cooper- Stephenson, *supra* n.32 at 17 .

57 Vizkelety, *supra* n. 21 at 234.

58 *Ibid.* at 234.

59 *Ibid.*

60 *Ibid.* at 193.

61 *Ibid.* at 90.

62 Ibid. at 205.

63 Ibid. at 205 Sandiford v. Base Communications Ltd. (1984) 5 C.H.R.R. D/2337 (Sask. Bd. of Inquiry).

64 Malik v. Ministry of Government Services(1981), 2 C.H.R.R. D/374 (Ont. Bd. of Inquiry).

65 Vizkelety, supra n. 21 at 90.

66 Ibid. at 203.

67 Ibid. at 225.

68 Ibid. at 229 referring to L. Lustgarten, "Justification by Faith?—II", (1984), 1354 New L.J. 9 at 9.

69 Vizkelety, supra n. 21 at 228.

## CHAPTER 9

### CONCLUSION: THE EDUCATION OF THE "REASONABLE PERSON"

Tort law has long made reference to the "reasonable person" in deciding the boundaries of what is legally protected and what is not. Standing by itself, the concept of the reasonable person represents a focal point from which common sense and common values of the community are applied to a given situation. Time after time and case after case, this application cumulatively becomes the measuring stick to which the community and the persons comprising the community may look the reasonableness of a particular action or course of actions. The concept can be used either to proactively predict or subsequently determine acceptable behaviour.

Of course, as we have seen, this measuring stick is not static. Over the years, the reasonable person has become less in tune with classical liberalism and more aware of social responsibilities. With that evolution in mind, one might suggest that the "reasonable person" would similarly be the guiding mind at the centre of a tort of non-discrimination. However, in order to be applied in each particular instance, the reasonable person must always be created in the mind of the judge or the civil jury, who are presumed to be capable of the task.

The reasonable person is key to the resolution of conventional negligence cases and, arguably, should play a



prominent role in the determination of cases under a tort of non-discrimination. Nonetheless, if the courts are to be effective in sharing a greater portion of the human rights field with the statutorily constituted commissions and boards, then the courts' "reasonable person" must be one who is also educated in understanding the meaning of inherent worth and in understanding that the concept of equality extends beyond treating persons the same.

It is generally accepted that the reasonable person cannot simply be a majoritarian and is not simply the echo of popular opinion at any given instance. Hence, a judge would not be rendering a legally correct (or philosophically sound) decision in upholding a prospective employer's decision not to hire Ms. Bhadauria because (hypothetically) empirical data was available showing that 86% of all adults favoured a "whites only" hiring policy for college instructors. Clearly, using the international definitions as the quintessential crystallization of community standards (and using human rights legislation as limited variation of these), the judge would be free to find that the actions of the potential employer were against public policy. In doing so, the judge in effect might say that (instead of the local community's reasonable person, who, at least at this time, is not being reasonable) the standard of an educated or ideal reasonable person shall be applied.

The example given above is intended to illustrate that the reasonable person considering questions of discrimination must be more politically aware than the reasonable person of the

more conventional torts. Although it goes without saying that, to some extent, policy is everpresent in all torts, it must lie much closer to the surface in judicial consideration of human rights than in the more private situations. However the policy engaged must be one based on fundamental principles of equality.

When considering what type of education we expect the educated reasonable person ( judge or juror) to have, we must not only look to human rights legislation, but we must also examine our attitudes toward the evils which we seek to curtail. Historically, prohibitions against discrimination were not developed in anticipation of problems. Rather, prohibitions against specific categories arose because serious situational injustices were noted in those specific areas. Of course, some expansion occurred as a result of analogy, but such analogies have almost always been based on established categories. This observation is in no way intended as a criticism. Indeed, it is only logical and necessary that where religious persecution is consuming a community, for example, then steps should be taken to protect the endangered group.

Having noted this, it must be pointed out that, as necessary as it is, this approach (commonly used by legislators) suffers from a major shortcoming. Simply, the shortcoming is that human rights policy is largely based on reacting to particular consequences, rather than being comprehensive and preventive and based on fundamental principles. While such policies could not have been expected from those who pioneered the

development of human rights, we have to expect logically coherent policies from our educated reasonable person today if judicial expansion into the area is to foster positive results.

At the crux of legal analysis is the ability to dissect a complicated issue into its most basic conceptual components in order to determine, inter alia, whether or not the propositions being propounded by each side have integrity. The jurisprudence of a tort of discrimination would necessarily require that these components be valued in the context of the aforementioned comprehensive policy. While initially, as a practical matter, the courts would probably rely heavily upon the jurisprudence of the statutorily constituted commissions, the inherent flexibility of tort law would eventually illuminate numerous opportunities for judicial innovation.

In light of the comprehensive policy, the court's duty to examine the substance of discrimination on an equal footing with the consequences of discriminatory behaviour will likely throw light on shades of discrimination to which not much thought or analysis has been given. In line with the objectives of the comprehensive and proactive judicial policy, the jurisprudence which would develop in these areas would serve to fill in the gaps between the protected categories. This, in turn, which would diminish uncertainties in the community about how discrimination is to be handled.

As with the developing Charter jurisprudence, over time the anti-discrimination jurisprudence would take on a complexion such that a victim, properly advised, could make a

reasonable determination whether to pursue the case through their human rights board or to relinquish that opportunity in order to pursue the case through the courts. The potential offender could also measure his or her decisions according to the law against discrimination. Of course, as noted earlier, financial concerns would be a significant factor in many cases, but the victim can still be said to have a potential additional course of action that would not otherwise be available.

It is clear that although some recent Charter jurisprudence such as Turpin<sup>1</sup> has more clearly defined potential openings for judicial expansion into the area of human rights and discrimination, the Supreme Court of Canada's decision in Bhaddaria<sup>2</sup> still constitutes a major stumbling block on the path to providing better protection for minorities. The decision in the case was premised on an optimism for expansion of legislation that has since foundered. No matter what the reasons for this, the results have had serious consequences not only for the immediate victim, but for the community as well. If we are serious about effective remedies for rights violations, then we cannot legitimately limit the forms or categories presently available. It is for that reason, it is submitted, that it is time that the Bhaddaria case be reconsidered and with it our commitment to rights protection.

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CHAPTER 9 FOOTNOTES

1 R v. Turpin, (1989) 1 S.C.R. 1296.

2 Seneca College v. Bhaduria (1979) 11 C.C.L.T.121 ( Ont. C.A.)  
(hereafter referred to in the footnotes as Bhaduria ) reversed by  
Seneca College v. Bhaduria, [1981] 124 D.L.R. (3d) 193 ( S.C.C).,  
(hereinafter referred to in the footnotes as Seneca College)

## BIBLIOGRAPHY

CASES

A.G. Can and Dupond v. Montreal ,[1978] 2 S.C.R. 770.

Alta Human Rights Commission v. Alta Blue Cross Plan , [1983] 6 W.W.R. 758, 28 Alta. L.R. ( 2d) 1, 4 C.H.R.R. D/1161 ( Alta. Q.B.).

Alcorn v. Ambro Engineering Inc. 2 Cal. 3d 493, 86 Cal Rptr. 88, 468 P. 2d 216 (1970).

Andrews v. Law Society of B.C. , [1989] 1 S.C.R. 143, [1989] B.C.D. Civ 1831-01 ( S.C.C.).

Anns v. Merton London Borough Council , [1978] A.C. 728 (H.L.).

Aronoff c. Hawryluk (1981), 2 C.H.R.R. D/534 (C.S.P.Que.).

Ashby v. White (1703), 2 Ld. Raym 938.

Aziz v. Adamson (1979), 11 C.C.L.T. 143 (Ont. S.C.).

B.C. Human Rights Coalition v. B.C. (Min. Human Resources (1987), C.H.R.R. D/4275 (B.C.H.R. Council).

Baird v. R. in Right of Canada (1983), 148 D.L.R. (3d) 1, 48 N.R. 276 (Fed. C.A.).

Bhadauria v. Seneca College ( 1979), 11 C.C.L.T. 121 at 132 reversed by Seneca College v. Bhadauria , [1981] 2 S.C.R. 191, (1981) 124 D.L.R. (3d) 193 . Reference to the Supreme Court level decision will be to 124 D.L.R. (3d) 193.

Bhinder v. C.N.R., [1985] 2 S.C.R. 561 .

Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics , 403 U.S. 388, 20 L.Ed. 2d 619, 91 S. Ct. (1971).

Bourhill v. Young, [1943] A.C. 92.

Brochu v. Nelson, [1986] B.C.D. Civil 1931-02 (B.C. S.C.).

Brooks v. Canada Safeway, [1989] 1 S.C.R. 1219.

Broome v. Cassell, [1972] A.C. 1027 ( H.L.).

Brown v. Waterloo Regional Board of Commissioners of Police ,(1982), 37 O.R. (2d) 277.

Bundy v. Jackson , 641 F. 2d at 946.

C.D.P. c. Antoniadis (1980), 1 C.H.R.R. D/ 188.

C.D.P. for Comete de Citoyens Espaces Verte Lasalle Inc c. Cite de Lasalle ( 1982), 3 C.H.R.R. D/ 659 (C.S.P.Que.).

C.D.P. for Leclair c. Paquet et Paquet (1981), 2 C.H.R.R D/444 .

C.D.P. c. Thiverge ( 1980), 1 C.H.R.R. D/191 .

C.N R. v. Canadian Human Rights Commission, [1984] 1 F.C. 96, 85 C.L.L.C. 17,013, 6 C.H.R.R. d/2906 ( sub nom. C.N.R. v. Action Travail des Femmes), 20 D.L.R. (4th) 668, 61 N.R. 354, leave to appeal granted 64 N.R., 397 . Leave to appeal varied 18th February, 1986; [1987] 1 S.C.R. 1114.

Cameron v. Nel- Gor Castle Nursing Home ( 1984), 5 C.H.R.R D/2170 ( Ont. Bd. of Inquiry).

Cassidy v. Sanchez (Tony's Place) (1988), 9 C.H.R.R. D/5258 (B.C.H.R. Council).

Central Trust v. Rafuse, [1986] 2 S.C.R. 147.

Christie v. York, [1940] S.C.R.139.

Comm. des Droits de la Personne c. Hopital Rivieres - des-Prairies ( 1986), 7 C.H.R.R. D/3615 (C.S.Que ).

Constantine v. Imperial Hotel, [ 1944] 2 All E.R. 171 (K.B.).

Courchene v. Marlborough Hotel, [1972] 1 W.W.R. 149, 22 D.L.R. (3d) 157 (Man.C.A.).

Daisley v. Fantasy Cuts, ( 1988), 9 C.H.R.R. D/ 4447 (B.C.H.R. Council).

Dolphin Delivery v. R.W.D.S.U.Loc. 580 , [1986] 2 S.C.R. 573, [1987] 3 W.W.R. 673 (S.C.C.).

Dominion Chain v. Eastern Construction (1974), 2 O.R. (2d) 481.

Dorset Yacht v. Home Office, [1973] 2 All E.R. 294 (H.L.).

Dubniczky v. Kiriakopoulos (1981), 1 C.H.R.R. D/455 (Ont. Bd. of Inquiry).

Fernando v. Alberta Union of Public Employees (1984), 6 C.H.R.R. D/2566 ( Alta. Bd. of Inquiry).

Fields v. Ueffing, (1985) 12 Admin. L.R. 115, (1984) 6 C.H.R.R. D/2711 (B.C.S.C.).

Frame v. Smith, [1987] 2 S.C.R. 99.

Gagnon c. Brassiere La Bulle Inc.( 1987), 7 C.H.R.R. D/ 3357 , [1986] D.L.Q. 28 ( C.S. Que.).

Gauthier v. Canadian Armed Forces (1989), 10 C.H.R.R. D/ 910 (Can. H.R. Trib.).

Gill v. El Vino Co. Ltd., [1983] 1 All E.R. 398 (C.A.).

Gomez v. Hug, 7 Kansas App. 2d 603, 645 P. 2d 916 (1982).

Gosse v. Town Council of Tilton (1984), 5 C.H.R.R. D/12299 (Nfld. Comm. of Enquiry).

Halushka v. University of Saskatchewan (1965), 53 D.L.R. (2d) 436 (Sask. C.A.).

Hand Woven Harris Tweed v. Veitch, [1942] A.C. 435.

Hayden v. Cox Enterprises, 28 Fair Employ. Prac. Case (B.N.A.) 1315, 1316 (N.D. Ga.).

Henson v. City of Dundee, 682 F. 2d 897, 905 (11th Cir. 1982).

Hinds v CEIC (1989), 10 C.H.R.R. D/5683 (Can. H.R. Trib.).

Home Office v. Dorset Yacht, [1970] 2 All E.R. 294 (H.L.).

Huck v. Canadian Odeon Theatres (1981), 2 C.H.R.R. D/ 351 (Sask. Bd. of Inquiry).

Hunter v. Southam, [1984] 6 W.W.R. 577, 41 C.R. (3d) 97, 55 A.R. 291, 11 D.L.R. (4th) 641 (S.C.C.).

Hunter v. Thornton (1957) 1 All E.R. 234, (1957) W.L.R. 321.

Hyman v. Southam Murray Printing (1981), 3 C.H.R.R. D/617 (Ont. Bd. of Inquiry).

Janes Claim (U.S. v. Mexico) U.S. - Mexican Claims Commission (1926) 4 R.I.A.A. 82.

Janzen v. Platy, [1989] 1 S.C.R. 1252 reversing (1986) 43 Man. R. (2d) 293; (1985) 38 Man R. (2d) 20 (Q.B.).

Johnson c. Comm. des Affaires Sociales, [1984] C.A. 61 (C.A. Que.) reversing [1981] C.S. 994 (C.S. Que.).

Jordan House v. Menow (1973), 38 D.L.R. (3d) 105 (S.C.C.).

Kamloops v. Nielsen, [1984] 5 W.W.R. 1, 54 N.R. 1, 29 C.C.L.T. 97.

Krouse v. Chrysler Canada et al. [1970] 3 O.R. 135, 12 DLR (3d) 463, 1 CPR (2d) 218.



L.C.B.O. v. Karumanchiri ( 1988) 19 C.C.E.L. 172 (Ont.S.C.).

Lechance c. Thiverge ( 1980), 1 C.H.R.R. D/191.

Le Pretre c. Auberge des Gouveneurs (1980) 7 C.H.R.R. D / 3356  
[1986] D.L.Q. 30 ( C.S. Que.).

Linklater v. Winnipeg Sun (1984), C.H.R.R. D/ 2098 (Man. Bd. of  
Adjud.).

Loew's Montreal Theatre v. Reynold (1919) , 30 Que. K.B. 459.

Malik v. Ministry of Government Services (1981), 2 C.H.R.R. D/374  
(Ont. Bd. of Inquiry).

Marckz (Eur. Court H.R., Series A, Vol. 31 , Judgment of June 13,  
1979).

McKinney v. University of Guelph ( December 6, 1990) , [1990]  
S.C.C.D. [4126-01] , 1991 C.H.R.R. D/171.

Ministry of Defence v. Jeremiah , [1979] 3 All E.R. 833, [1980] Q.B.  
87.

Mitchell v. Nobilium Products Ltd. (1981) , 3 C.H.R.R. D/641 ( Ont.  
Bd. of Inquiry).

Mogul S.S. Co. v. McGregor Gow & Co. (1892) A.C. 25 (H.L.).

Moore v. B.C. (Gov't), (1986) 4 B.C.L.R. (2d) 246. (S.C. in Chambers).

Motherwell v. Motherwell , [ 1976] 6 W.W.R. 550 (Alta. C.A.).

Moysa v. Alberta Labour Relations Board , [1989] 1 S.C.R. 1572 .

Nantel v. Parisien (1981), 18 C.C.L.T. 79 ( Ont. H.C.).

Noble v. Wolfe and Alley, [1948] 4 D.L.R. 123, affirmed  
[1949] 4 D.L.R. 375 ( C.A.).

Obirek v. Manitoba (1984), 32 Man R. 110 ( Q.B.).

Operation Dismantle v. The Queen, [1985] 1 S.C.R. 44

P.G. Que. c. Service de Taxi Nord Est. (1984), 7 C.H.R.R. D/ 3112  
(C.S. Que.).

Peake v. Automotive Products ,[1978] 1 All E.R. 106, [1978] Q.B. 233  
( C.A.).

Pereira v. Hanson , [1986] B.C.D. Civ. 3385-15 .

Peters v. United Cabs Victoria (1989), 10 C.H.R.R. D/5430  
(B.C.H.R. Council).

Photo Production v. Securicor, [1978] 1 W.L.R. 856, at 862, [1978] 3 All E.R. 146.

Quinn v. Leatham, (1901) A.C. 495 (H.L.).

Quinn v. Williams Furniture Ltd., I.C.R. 328 (C.A.).

Quintanilla Claim (Mexico v. U.S.) U.S.- Mexican General Claims Commission (1926) 4 R.I.A.A. 101.

Quong-wing v. R (1914), 49 S.C.R.440 (Sask.).

Re Barnes and P.P.F.Loc. 46 and Kellogg ( N.Y.) Ont. Bd. of Inquiry, Arthurs, Chairman, 29th April 1968 (unreported).

Re Bulger (1978) 45 N.B. R. (2d) *sub nom. Bulger v. Royal Canadian Legion Branch No. 4*, 118 A.P.R. 1 (N.B. Bd. Inquiry).

Re Dakota Ojibway Tribal and Bewa, [1985] 24 D.L.R. (4th) 374 (Man.C.A.).

Re Drummond Wren, [1945] O.R. 778.

Re Kondellas and Saskatchewan Human Rights Commission, (1986), 34 D.L.R. (4th) 30, [1987] 2 W.W.R. 195, 52 Sask. R. 139 ( Q.B.).

Re Saskatchewan Human Rights Commission and Citation Investments Ltd., (1986) 7 C.H.R.R. D/3531, affirmed 7 C.H.R.R. D/3464, affirmed (1988) 8 CHRR. D/4166 (Sask. C.A.).

R.v.Burnshine, [1975] 1 S.C.R. 693, [1974] 4 W.W.R. 49, 25 C.R.N.S. 270, 44 D.L.R. (3d) 584.

R.v.Hurd, [1972] 2 O.R. (Ont. C.A.).

R. in right of Canada v. Saskatchewan Wheat Pool [1983] 1 S.C.R. 205, 143 D.L.R. (3d) 9.

R. v. Turpin, [1989] 1 S.C.R. 1296.

R. v. Wigglesworth ( 1987), 33 C.C.C.385 ( S.C.C.).

Robichaud v. Can.(Treasury Bd.), [1987] 2 S.C.R. 84, 75 N.R. 303, 40 D.L.R. (4th) 577, 8 C.H.R.R. D/4326.

Robichaud v Can.(Treasury Bd.)#2 (1990) 11 D/ 194 (Can.H.R.Trib.).

Rogers v. Clarence Hotel, [1940] 2 W.W.R. 545, 55 B.C.R. 214, [1940] D.L.R. 583 ( C.A.).

Rogers v. Loews L'Enfant Plaza Hotel, 526 F. Supp 523 (1981).

Rookes v. Barnard, [1964] A.C.112 .

Saccone v. Orr, (1981) 34 O.R. (2d) 317.

Sandiford v. Base Communications Ltd., (1984), 5 C.H.R.R. D/2337 (Sask. Bd. of Inquiry).

Saskatchewan (Human Rights Comm.) v. Engineering Student's Society (1989), 10 C.H.R.R. D/ 5636 (Sask. C.A.).

Saskatchewan (Human Rights Comm.) v. Saskatchewan (Department of Social Services) (1989), 10 C.H.R.R. D/ 6272 (Sask. Bd. of Inquiry).

Schmidt v. Austicks Bookshops Ltd. [1978] I.C.V.R. 85, E.A.T.

Scowby v. Glendenning, [1986] 2 S.C.R. 226.

Senay c. Corp. des Aliment Ault (1985), 7 C.H.R.R. (C.S. Que), affirming 7 C.H.R.R. D/ 3373 (C.S.P. Que.).

Showboat Entertainment Centre Ltd. v. Owens, [1984] 1 I.R.L.R.

Tabar v. Scott (1982), 3 C.H.R.R. D/1073 (Ont. Bd. of Inquiry), reversed in part, (1988) 9 C.H.R.R. D/ 4537.

Thibault c. College de Sherbrooke (1981), 2 C.H.R.R. D/ 530 (C.S. Que.).

U.S.A. v. Iran I.C.J. Rep.(1980), p.3.

Wagon Mound (No. I), [1961] A.C 388; [1961] 1 All E.R. 404 (P.C.).

Walter v. A.G. Alta., [1969] S.C.R. 383 [Alta.].

Waplinton v. Maloney Steel Ltd. (1983) 4 C.H.R.R. D/1262 (Alta. Bd. of Inquiry); affirmed (1983), 4 C.H.R.R. D/1483 (Alta. Q.B.).

Warren v. Chapman (1984), 5 C.H.R.R. D/226, [1984] 5 W.W.R. 45, 29 Man. R. (2d) 172 (Man Q.B.).

Warrington v. E.B. Misty Inc., [1982] B.C.D.Civ 1470-01 (B.C.S.C.).

Wilkinson v. Downton, [1897] 2 Q.B. 57; 66 L.J.Q.B. 493; 13 T.L.R.388; 76 L.T. 493 (Q.B.).

Union Collier Co. v. Bryden, [1899] A.C. 580 (P.C.).

Zarcznska v. Levy, [1979] 1 All E.R. 814.

## INTERNATIONAL DOCUMENTS

European Convention on Human Rights 1950 , E.T.S. No. 5; U.K.T.S. 70 (1950), Cmd. 8969.

International Covenant on Civil and Political Rights U.K.T.S. 6 (1977), Cmd. 6702; 61 A.J.I.L. 870 (1967).

Universal Declaration of Human Rights (G.A.O.R. 217A, (III)) G.A.O.R., 3rd Sess., Part I, Resolutions, p.71).

## LEGISLATION

Canadian Charter of Rights and Freedoms, Constitution Act, 1982, as enacted by Canada Act, 1982 (U.K.), 1982 c.11

Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12 as am.

Human Rights Act, S.B.C. 1984, c. 22 , as am.

Human Rights Act, C.C.S.M., c H 175 as am.

Human Rights Act, S.N.S. 1969, c.11 as am.

The Individual's Rights Protection Act, R.S.A., 1980, c. 12, as am.

The Insurance Act S.O. 1932 c. 24, s. 4 .

New Brunswick Human Rights Code, R.S.N.B. , 1963, c. H-11, as am.

Newfoundland Human Rights Code, S.N. 1988, c. 62.

Northwest Territories Fair Practice Ordinance, R.O.N.W.T. 1974, c. F-2 as am.

Ontario Human Rights Code, S.O. 1981, c. 53 .

Prince Edward Island Human Rights Act, S.P.E.I. 1975, c. 72, as am.

Racial Discrimination Act, S.O. 1944, c. 51 , s.1.

Saskatchewan Human Rights Code, 1979 (Sask.) c. S-24.1.

## BOOKS

Bernier, Ivan International Legal Aspects of Federalism, (London: Longman Group, 1973) .

Brotsky, Gwen & Day, Shelagh Canadian Charter Equality Rights for Women ( Canadian Advisory Council on the Status of Women, 1989).

Cooper-Stephenson, Ken B. and Saunders , I.B. Personal Injury Damages in Canada ( Toronto: Carswell, 1981).

Canadian Charter of Rights Annotated, ( Canada Law Book Inc.) .

Donnelly, Jack, The Concept of Human Rights (New York: St. Martin's Press, 1985).

Dworkin , Ronald Taking Rights Seriously (Cambridge, Mass.: Harvard University Press, 1977).

Encyclopedia of Philosophy (New York: Macmillan, 1967). Vol. 3-4, "Kant, Immanuel".

Evans J.M., Janisch H.N., Mullan D.J et al (eds.) Administrative Law ( Edmond Montgomery: Toronto, 1984).

Feagin and Feagin , Discrimination American Style, (Prentice-Hall).

Finkelstein, Niel, Laskin's Constitutional Law, (Vancouver: Carswell, 1986) 5th ed. Vol. 1.

Finnis, J., Natural Law and Natural Rights, (Oxford: Clarendon Press, 1980).

Fleming, John G., The Law of Torts, 7th ed. (Agincourt, Ont: Carswell, 1987).

Gibson, Dale, Aspects of Privacy Law ( Toronto: Butterworth, 1980).

Harris, D.J., Cases and Materials on International Law, 3rd ed. (London: Sweet & Maxwell, 1983).

Hill, Daniel G., "Merchants of Hate", Human Relations, June 1965, published by the Ontario Human Rights Commission , 4 as quoted in W. S. Tarnopolsky, Discrimination and the Law, (Toronto: De Boo, 1982).

Hill, Daniel, Human Rights in Canada: A Focus on Racism, (Canadian Labour Congress, 1977)

Hogg, Peter, Constitutional Law of Canada, 2d ed. (Toronto: Carswell, 1985).

Keene, Judith, Human Rights in Ontario (Toronto: Carswell, 1983).

Kindred, Hugh M., Castel, J.G., Graham W.C. et al eds. International Law : Chiefly as Interpreted and Applied in Canada 4th ed. ( Toronto: Edmond Montgomery, 1987).

- Kiralfy, A.K., The Action on the Case, ( London: Sweet & Maxwell, 1951).
- Lord Lloyd of Hampstead, Introduction to Jurisprudence (4th ed.), (London: Stevens & Sons, 1979) .
- Macdonald, R. St. J. & Humprey, John , The Practice of Freedom (Toronto: Butterworth, 1979).
- Martin, Sheilah & Mahoney, Kathleen E. eds. Equality and Judicial Neutrality ( Toronto : Carswell, 1987).
- McKeon, Richard (ed.), Introduction to Aristotle (New York: Random House, 1947).
- Milne, A.J.M., Freedom and Rights (London: George Allen and Unwin, 1968).
- Milne, A.J.M., Human Rights and Human Diversity (Albany: State University of New York, 1986).
- Robertson, A.H. (ed.), Privacy and Human Rights (3d.) ( Manchester: Manchester University Press, 1970).
- Sigmund, Paul E., Natural Law in Political Thought (Washington: Winthrop, 1971).
- Singer, Peter, Practical Ethics (Cambridge: Cambridge University Press, 1982).
- Stewart, Walter, But Not in Canada! (Toronto: Macmillan, 1976).
- Tarnopolsky, Walter S. & Pentney, William F., Discrimination and the Law (5th Cum. Suppl) (Don Mills, Ont: Richard de Boo, 1985).
- Vierdag, E.W. , The Concept of Discrimination in International Law (The Hague: Nijhoff, 1973).
- Vizkelety, Beatrice, Proving Discrimination in Canada, (Toronto: Carswell, 1987).
- Waddams, S.M., The Law of Damages (Toronto: Canada Law Book, 1983).
- Waddams, S. M., Study of Law, 2nd ed. (Toronto: Carswell, 1983).
- Weir, Tony, A Casebook on Torts, 2nd ed. (Cambridge Press, Cambridge, 1970).
- Williams, Glanville, Foundations of the Law of Tort (Toronto: Butterworth, 1976).

Wright, C.A., Linden, A.M. & Klar, L.N. eds., Canadian Tort Law 2nd ed. ( Toronto: Butterworth, 1985).

#### NEWSPAPER

Allard, Christian, "Saskatchewan Human Rights Code can't muzzle student paper", Lawyers Weekly, March 17, 1989, p. 11.

Ellis, Susan, " 'Adults only' condo illegal, but Ont. mum's award cut", Lawyers Weekly, May 31, 1991, p. 7.

Schmitz, Christine, "Human Rights Act used to declare law inoperative", Lawyers Weekly, Sept. 30, 1988, p. 1, commenting on McKinley v. M.N.R. (1987)

"\$1000 for 'community disgrace' awarded to B.C. Sikh." in Lawyers Weekly, March 24, 1989, p. 9

"Report paints Quebec as racist", Vancouver Sun, March 17, 1991, p. A12.

#### ARTICLES

Alston, Philip " The Universal Declaration at 35: Western and Passe or Alive and Universal " (1983) 32 Int'l Comm. Jur. Rev. 60 .

Bankier, Jennifer, " The Future of Class Actions " [1984] 9 Can Bus. L.J. 260.

Black, William W. , "From Intent to Effect: new Standards in Human Rights" (1980), 1 C.H.R.R. D/1.

Black, William W., "Human Rights in British Columbia: Equality Postponed", 1984-5 Cdn. H. R. Yrbk. 219.

Black, William W. and Smith, Lynn, " Notes on Bill-27" (1983), 4 C.H.R.R. C/83-11.

Bogart, W.A., "Appropriate and Just: Section 24 of the Canadian Charter of Rights and Freedoms and the Question of Judicial Legitimacy." [1987] Dal. Law J. p. 81.

Bruner, Arnold, " The Genesis of Ontario's Human Rights Legislation" (1979), 37 U.T.Fac.L.Rev. 236.

Burns, P. , " The Law and Privacy: The Canadian Jurisdiction" (1976) Can. Bar Rev. 1.

Case comment, "Review Tribunal rejects Robichaud arguments against lid on damage payments. ", (1990) Can. Hum. Rights Advoc. (Jan.), p. 6

- Coffin, F., "The Frontier of Remedies: A Call for Exploration" (1979), 67 Calif. L.R. 983.
- Connelly, A.M., "Problems of Interpretation of Art. 8 of ECHR " (1986), 35 Int'l Comp. Quar. 567.
- Dockart, Jane L. & Malchow, E.Lynn, "Sexual Harassment in the Workplace " (1987), 23 Tort & Ins. L.J. 181.
- Dworkin, Gerald & Harari, Abraham, "The Beaudesert Decision- Raising the Ghost of the Action on the Case, Part II (1967) 40 Austr. L.J. 347.
- Fridman, G.H.L., "Punitive Damages in Tort" ( 1970), 48 Can. Bar Rev. 373.
- Glasbeek, H. J., "Outraged Dignity- Do we need a new tort?" (1968), 6 Alta. Law Rev. 77.
- Handford, M., "Threatening or Insulting Words"(1976), 54 Can. Bar Rev. 563.
- Hogg, P.W., "The Jurisdictional Fact Doctrine in the Supreme Court: Bell v. Ontario Human Rights Commission" (1971), 9 Osgoode Hall L.J. 203.
- Hacker, Hyman, " Private Club Membership- Where does Privacy End and Discrimination Begin?" (1987), 1 St. John's Rev. 474.
- Hucker, John & McDonald Bruce C., "Human Rights in Canada" (1969) McGill L.J. 220.
- Humphrey, John, "The Canadian Charter of Rights and Freedoms and International Law", 50 Sask. Law Rev. 13.
- Hunter, Ian, "Human Rights Legislation in Canada : Its Origin, Development and Interpretation" (1976), 15 U.W.O.L. Rev. 21.
- Hunter, Ian, " Civil Actions for Discrimination" [1977] , 50 Can . Bar Rev. 106.
- Hunter, Ian, " The Stillborn Tort of Discrimination" (1978), 14 Ott. Law Rev. 219.
- Hunter, Ian, " Liberty and Equality : Tale of Two Codes"(1983) 29 McGill L.J. 1.
- Hunter, Ian, "Legal Rights, the Charter and the Ontario Human Rights Code", (1985-6) 6 Advoc. Quar. p. 162.
- Hutchison A.C. & Petter, Andrew, "Private Rights/ Public Wrongs: The Liberal Lie of the Charter" (1988), 38 U.T.L.J. 278 .



Knopff Rainier, "Human Rights Litigation, 1956-1984: A Statistical Profile" 8 C.H.R.R. C/87-1.

Linden A.M., "Tort Law as Ombudsmen " (1973), 51 Can. Bar Rev. 155.

Lipsett Edward H., " Comments on the Proposed Manitoba Code of Human Rights" (1984-5), 14 Man. L.J. 474.

Lockhard, Duane, "The Politics of Antidiscrimination Legislation" (1965/6) 3 Harv. J. on Leg. 3.

Lustgarten, Laurence, " Justification by Faith?-II" (1984), 135 New L.J.9

Macdonald, R.A, "Postscript and Prelude- The Jurisprudence of the Charter: Eight Theses"(1982), 4 Sup. Ct. Law Rev. 321.

McConnell, W.Howard, "Case Note" (1987) 66 Can Bar Rev. 616.

McLaren, John P.S., "The common law nuisance actions and the environmental battle- well tempered swords or broken reeds?" (1972) Osgoode Hall L. J. 505.

Maddon, J. & Wissinki, J., "Achieving Title VII Objective at Minimum Social Costs : Optimal Remedies and Awards" (1984-5), 37 Rutgers .

Maddott, "Libel Law, Fiction and the Charter" (1983), 21 Osgoode Hall L.J. 741.

Matas, David , "Domestic implementation of international human rights agreements" (1987) Cdn. H.R. Yrbk. 90 .

Malone,Wes, "Genesis of Wrongful Death"(1965), 17 Stan. Law Rev. 1043.

Morris, Clarence, "Punitive Damages in Tort Cases"(1931), 44 Harv. Law Rev. 1172 .

Molot, H. "The Duty of Business to Serve the Public: Analogy to the Innkeeper's Obligation" (1968), 46 Can. Bar Rev. 612.

Mullen, David, "Judicial Deference to Administrative Decision-Making in the Age of the Charter" (1985-6), 59 Sask. L.R. 203 .

Norman, Ken, "Case Comment on St.Paul's Roman Catholic Separate School v. CUPE and Huber (1988), 67 Cdn. Bar Rev. 365.

Norman, Ken, " The Charter for the Public Sector and for the Private Actor, Human Rights Codes: A False Dichotomy Leading to the Wrong Result." ( 1984), 5 C.H.R.R. c/84-7.

Petter, Andrew, " The Charter and Private Action: The impact of Section 15 on Human Rights Codes" (1984), 5 C.H.R.R. c/84-3 .

Pilkington, M. L., "Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms" (1984), 62 Can. Bar Rev. 516.

Roach, Kent., "Section 24 (1) of the Charter : Strategy and Structure" (1987), Crim Law Quar. 222.

Samuel, Geoffrey, "'Public' and 'Private' Law: Definition Without Distinction" (1980) 43 Mod. Law Rev. 240.

Scott, F.R., "Dominion Jurisdiction Over Human Rights and Fundamental Freedoms" (1949) 27 Can. Bar Rev. 497.

Schmeiser, D.A., "A Human Rights Commission for Saskatchewan" (1962), 28 Sask. Bar Rev. 88.

Tarnopolsky, Walter S., "Iron Hand in the Velvet Glove" (1968), 46 Can. Bar Rev. 565.

Tarnopolsky, Walter S., "A Comparison Between the Canadian Charter of Rights and Freedoms and the International Covenant on Civil and Political Rights" (1983), 2 Queens Law J. 211.

Weinrib, E.J., "Towards a Moral Theory of Negligence Law", (1983), 2 Law and Philosophy 37.

Whitman, Christina, "Constitutional Torts", (1980) 79 Mich. L. Rev. 5.

Wildsmith, Bruce, "An American Enforcement Model of Civil Process in a Canadian Landscape" (1980-1), 6 Dal. L.J. 71.

Williams, Glanville, "The Foundations of Tortious Liability" (1939), 7 Cam. L. J. 110.

#### BOOKLETS. GOVERNMENT DOCUMENTS

1985 Canadian Human Rights Commission Annual Report.

1986 Canadian Human Rights Commission Annual Report.

1987 Canadian Human Rights Commission Annual Report.

1988 Canadian Human Rights Commission Annual Report.

Senate Proceedings, 1950 Special Committee on Human Rights, (Ottawa, 1950).

Quebec Report on Civil Rights published by Government of Quebec, (Montreal, 1968).

Race Relations and the Law, Report of a symposium held in Vancouver, B.C., April 22-24, 1982. (Minister of Supply and Services Canada, 1983).

#### COLLECTED ESSAYS

Cleveland, Harlan, "The Chain Reaction of Human Rights" in A. Henkin (ed.) Human Dignity : The Internationalization of Human Rights (New York: Aspen Institute for Humanistic Studies 1978) p. 6.

Day, Shelagh, "Impediments to Achieving Equality" in Equality and Judicial Neutrality, S.L. Martin and K.E. Mahoney eds. (Carswell : Calgary, 1987) p. 402.

Diemer, Alwin "The 1948 declaration : an analysis of meanings" in Philosophical Foundations of Human Rights, (Paris: UNESCO, 1986), p. 97.

Gibson, R. Dale " Legal Protections of Privacy " in The Practice of Freedom, R. St. J. Macdonald & John Humprey (eds.), (Toronto: Butterworth, 1979) p.179.

Hersch , Jeanne "Human rights in western thought: conflicting dimensions" in Philosophical Foundations of Human Rights (Paris: UNESCO, 1986) p. 132.

Hill, Daniel G. "Merchants of Hate", Human Relations, June 1965, published by the Ontario Human Rights Commission , 4 as quoted in Tarnopolsky, Discrimination and the Law, (Toronto: De Boo, 1982) p. 32.

Hunter, Ian " The Origin, Development and Interpretation of Human Rights Legislation" in The Practice of Freedom, R. St. J. Macdonald & John Humprey (eds.), (Toronto: Butterworth, 1979) p. 97.

Lederman, S.N. and Ristic, Ann "The relationship Between Federal and Provincial Rights Legislation and Charter Equality Rights" in Righting the Balance: Canada's New Equality Rights, L. Smith ed.(1986) p. 83.

Mead, Margaret "Some anthropological considerations concerning natural law" in ed. by Lord Lloyd of Hampstead, Introduction to Jurisprudence 4th ed. (London: Stevens & Sons, 1979) p. 156.

Norman, Ken "Problems in Human Rights Legislation " in Equality and Judicial Neutrality S.L. Martin and K.E. Mahoney eds. (Carswell: Calgary, 1987) p.391.

Opsahl, Torkel" The Convention and the Right to Respect for Family Life " in Privacy and Human Rights, (3d.) A.H. Robertson, ed. (Manchester: Manchester University Press, 1970) p. 182.

Osbourne, Philip," The Privacy Acts of British Columbia, Manitoba and Saskatchewan" in Aspects of Privacy Law, Dale Gibson (ed.) (Toronto: Butterworth, 1980) p. 73.

Patenaude, Pierre, " The Evolution of the Right To Privacy in Quebec " in Law and Society in Canada: A Historical Perspective , D.J. Bercuson and L.A. Knafla ( eds.) (University of Calgary, 1979) p. 45.

Roberts, Lance, "Understanding Affirmative Action" in Discrimination, Affirmative Action and Equal Opportunity , Block, W. and Walker, M. (eds.) (Fraser Institute: Vancouver, 1981).

Schafer, Arthur, " Privacy, a Philosophical View" in Aspects of Privacy Law, Dale Gibson (ed.) (Toronto: Butterworth, 1980) p. 18.

Tarnopolsky, Walter S. , "The Control of Racial Discrimination" in The Practice of Freedom, R. St. J. Macdonald & John Humprey (eds.), (Toronto: Butterworth, 1979) p. 289.

Vegleris, Phedon " Twenty Years of the Convention and Future Prospects " in Privacy and Human Rights, 3d , A.H.Robertson (ed.) ( Manchester: Manchester University Press, 1970) p.340.

Whyte, John D. "Is the Private Sector Affected by the Charter?" in Righting the Balance: Canada's New Equality Rights, Lynne Smith et al ed. (Saskatoon: Can. Human Rights Reporter Inc, 1986) p. 145.

#### UNPUBLISHED WORKS

K. Cooper-Stephenson, Tort II Casebook, College of Law, University of Saskatchewan, 1988) [unpublished].